No. 406

In the Supreme Court of the United States

OCTOBER TERM, 1943

ANTHONY CRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases—Continued.

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OPINION BELOW

The opinion of the circuit court of appeals (R. 475–488) is reported at 137 F. (2d) 888.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 7, 1943 (R. 489). The petition for a writ of certiorari was filed on September 30, 1943, and was granted on November 8, 1943 (R. 489). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether overt acts 1, 2, and 10 as alleged in the indictment and proved by the evidence were legally sufficient to sustain a charge of treason.

2. Whether, with respect to overt acts 2 and 10, there was failure to comply with the "two witnesses" rule in that, as petitioner contends:

(a) No two witnesses each testified to the whole of either of such acts; and

(b) The proof in support of overt act 10 consisted of testimony as to statements made by petitioner to officers of the Government during the period between his arrest and his arraignment.[1]

3. Whether the district court committed reversible error:

(a) In admitting in evidence a copy of the Constitution of the United States on which the petitioner had marked the section defining treason;

(b) In allowing, on cross-examination of the petitioner, a question as to whether he had received a letter from his nephew warning him that his letters were so unfriendly to the United

[1] By this contention, made for the first time in petitioner's brief in this Court, petitioner seeks to invoke the doctrine of *McNabb v. United States*, 318 U. S. 332.

States that he was in danger of being put on a blacklist;

(c) In permitting the introduction of what petitioner characterizes as "an excessive amount of evidence" to substantiate the enemy character of the persons to whom petitioner was charged with having given aid and comfort.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution, Art. III, sec. 3:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

18 U. S. C. 1, 2 (R. S., §§ 5331, 5332; Act of Mar. 4, 1909; c. 321, §§ 1, 2, 35 Stat. 1088):

> 1. Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.
>
> 2. Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five

years and fined not less than $10,000, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States.

STATEMENT

Petitioner was indicted, in the District Court of the United States for the Southern District of New York, for treason. The indictment alleged ten overt acts, only three of which (overt acts 1, 2, and 10) were submitted to the jury (R. 351, 437). Petitioner was found guilty by the jury (R. 448) and was sentenced to 45 years' imprisonment and to pay a fine of $10,000 (R. 453). Upon appeal to the Circuit Court of Appeals for the Second Circuit, his conviction was unanimously affirmed (R. 489).

The case presents another phase of activities part of which were before this Court in *Ex parte Quirin*, 317 U. S. 1. The petitioner here is charged with having given aid and comfort, with treasonous intent, to Werner Thiel and Edward Kerling, two of the eight saboteurs. In the first alleged overt act it is charged that he "did meet with * * *, and did confer, treat and counsel with" Thiel and Kerling, on June 23, 1942, at the Twin Oaks Inn at Lexington Avenue and 44th

Street in New York City, for the purpose and with the intent of giving them aid and comfort. (R. 437–438). In the second it is charged that on the same date, with the same intent and purpose, he "did accompany, confer, treat, and counsel with" Thiel alone, at the Twin Oaks Inn and also at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues in New York City (R. 438). As the evidence set forth below shows, petitioner was with Thiel for over three hours on the evening of June 23, 1942, at the Twin Oaks Inn and later at Thompson's Cafeteria, and Kerling joined them for a part of the time at the former place. Overt act 1 has reference to the time that Kerling was with them at the Twin Oaks Inn, and overt act 2 to their conference alone at the same place after Kerling left, and to their further conference at Thompson's Cafeteria. In the third overt act submitted to the jury (overt act 10) it is charged that on June 27, 1942, petitioner gave five false statements to Special Agents Willis and Ostholthoff, of the Federal Bureau of Investigation, regarding Thiel, for the purpose of concealing the latter's identity and mission (R. 438).[2]

The evidence adduced at the trial is well summarized in the opinion of the court below (R. 475), and the petitioner in his brief here (p. 4) has

[2] The content of these statements is set forth (*infra*, pp. 19–20) in our discussion of the evidence.

chosen to accept that summary as sufficient for purposes of his statement of the case. However, we believe that this Court's consideration of the case may be aided by a somewhat more detailed statement of the evidence, with appropriate references to the Record.[3]

Petitioner was born in 1900 in Ollendorf in Westphalia, Germany (R. 218–219). He served for a short time in the German Army in the last days of the first World War (R. 220–221). In 1925 he came to this country with the avowed intention of remaining here permanently and becoming a citizen (R. 223). His passage was paid by a German farmer in Iowa for whom he worked for two years (R. 222, 224–225). He removed in the fall of 1927 to Chicago, where he was employed for a while by a contractor and by a dredging company (R. 225). There, in 1928, he made formal declaration of intent to become a citizen (R. 225–226). From Chicago he removed to South Bend, Indiana, where he worked for the Studebaker Corporation (R. 227), and from there he removed to Detroit, where he worked as a die fitter for several different automobile companies (R. 227–229). There, in 1929, he met Thiel, who had come to this country in 1927 from a place in Germany not far from petitioner's birthplace (R. 229, 236–237). The two became close friends, and were together a great deal of the time during

[3] The facts as stated above are substantially undisputed (Pet. Br., p. 4).

the next twelve years. When the depression curtailed employment in Detroit, petitioner went to New York, where he secured work as a painter's helper and at various odd jobs (R. 228). Thiel followed him to New York nine or ten months later (R. 237–238). In July 1933, petitioner went to Hammond, Indiana, where he was employed for nearly three years as a fireman and mechanic at St. Margaret's Hospital (R. 229–230). Thiel joined him there at the invitation of petitioner, who lent him the money with which to come (R. 239–240). There they saw each other nearly every day (R. 240), and in 1934 both joined the Friends of New Germany, predecessor of the German-American Bund (R. 240).[1] Petitioner was secretary or treasurer of the Hammond unit (R. 298), but resigned from the organization in 1935 (R. 142, 241). In his statements to Federal Bureau of Investigation agents he said that he had resigned because of his dislike of the organization's military emphasis and trappings and radical activities (R. 142–143, 241); at the trial he testified that he was also actuated by a swindle that had occurred (R. 241, 297–298). Thiel remained in the organization (R. 241). He was described by petitioner in his testimony as a man who would "get irritated when he was opposed in his subject, in his particular views, particularly about national

[1] Thiel had become interested in this organization somewhat earlier, in 1932 or 1933 in New York (R. 238–239).

ideas", who from the early 1930's had favored "the national socialist doctrine", and who had stated, in one of their conversations in 1932 or 1933, "that a couple of hundred thousand men could easily be sacrificed for the expansion or glory of a nation" (R. 239). At some time later Thiel left Hammond for employment on the Pacific coast (R. 241).

Petitioner, in June 1936, visited Germany (R. 230, 242). He remained there until the following September, witnessed the Olympic games at Berlin, and saw various members of the German-American Bund whom he had met in this country (R. 132, 243, 299–300). On November 9, 1936, after his return, he received his final citizenship papers at Hammond (R. 29, 242). That winter he and Thiel joined one Thielmann in an unsuccessful delicatessen venture in Florida (R. 230–232). In May 1937, petitioner returned to New York, where he was joined by Thiel, and the two lived either together or in close proximity for nearly four years (R. 232–235, 245, 250–251.)[5] In March 1941, Thiel left for Germany, stating that he felt war was imminent between the United States and Germany and that his prospects were better in Germany (R. 251–253). Petitioner ad-

[5] During this period in New York petitioner held various positions (R. 232–235). For the two years preceding his arrest on June 27, 1942, he was employed by the National Licorice Company as a stationary engineer (R. 234–235).

mitted that he knew Thiel to be a thorough-going Nazi at the time he left for Germany (R. 251–252).

Petitioner corresponded with Thiel in Germany (R. 328–329). His pre-Pearl Harbor letters were sympathetic with the German cause and critical of American opposition to that cause.* That he retained the same attitude after Pearl Harbor appears from a letter (Gov. Ex. 63, R. 114, 116–117, 336–338, 343–344) written in April, 1942, to Thiehmann, with whom he and Thiel had been associated in the delicatessen business in Florida, in which he said, referring to the possibility of being drafted: "Personally

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* On November 25, 1941, he wrote Thiel (Gov. Ex. 68, R. 117–118, 331–334) saying that he had declined a $100 a week job at Detroit "as I don't want to dirty my fingers with war material;" that "not vocabularies, but defiance, boldness, will and sharp weapons will decide the war, and the German Army and the German people are not lacking in these;" that "We sit here in pitiable comfort, when we should be in the battle—as Nietzsche says—I want the man, I want the woman, the one fit for war, the other fit for bearing;" and that he would have to be circumspect in discussing political developments in America "since this letter will probably go twice through enemy censorship." He testified on direct examination (R. 257) that by the last statement he had meant British and German censorship, but had difficulty in explaining, on cross-examination (R. 332–333), why he would have applied the term "enemy" to Germany in a letter to Thiel, or why he would have expected a German censor to take exception to his comments. On December 3, 1941, he wrote his relatives in Germany, saying (Gov. Ex. 69, R. 117–118, 315, 334–336): "Personally I am still well and spending my days really much too pleasantly, in view of the gigantic sacrifices which the glorious disciplined German Army is making from day to day for the Homeland."

I should not care at all to be misused by the American army as a world conqueror."[7] On cross-examination petitioner admitted that he had listened to German short-wave broadcasts and knew that the theme of German propaganda was that England and the United States were fighting a war of aggression and seeking to conquer the world (R. 354).

Petitioner next saw Thiel on the evening of June 22, 1942.[8] The circumstances which led to the meeting, as he described them, were unusual. That morning a strange voice called his name from the hall of the rooming house where he lived, and on his failure to respond an unsigned note, in an unknown handwriting, was slipped under his door reading: "Be at the Grand Central Station tonight at 8 o'clock, the upper platform near the information booth, Franz from Chicago has come into town

[7] In setting forth these excerpts from petitioner's letters written before and after Pearl Harbor, we do not intend to suggest that any of them exceeded the limits of his right of freedom of thought and speech. We set them forth for the same purpose for which they were introduced in evidence, namely, as evidence indicative of a motive for the acts later committed and as bearing on his state of mind.

[8] In the meantime, Thiel had entered the German army and, in April 1942, with seven other German soldiers who likewise had lived in the United States, had volunteered for a special mission to destroy the American aluminum industry (R. 30–31). They were taught the use of incendiaries and explosives and supplied with eight boxes of explosives (R. 40), some of which were made to look like pen and pencil sets and others like lumps of coal (Gov. Exs. 11–27, R. 33–35).

and wants to see you; don't fail to be there" (R. 261–262). Petitioner testified that he knew no "Franz from Chicago" (R. 262). Nonetheless he was there at the appointed hour, and ten minutes later Thiel appeared (R. 262, 301).[9] After a brief conversation they walked to the Twin Oaks Inn, where they talked from 8:25 P. M. until 10:30 P. M. (R. 263). Petitioner made no inquiry as to why Thiel had taken such a mysterious method of getting in touch with him (R. 302); but one of the first things he said to Thiel was "Say, how have you come over, have you come by submarine?" (R. 263). Thiel looked startled, smiled,[10] and said "Some other time I am going to tell you all about this." He cautioned peti-

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The eight saboteurs were brought to this country in two groups, by German submarines. One group, consisting of Edward Kerling, as leader, and Thiel, Haupt, and Neubauer, was landed by rubber boat on June 17 at Ponte Vedra Beach near Jacksonville, Florida (R. 42, 44, 48, 63, 64–66, 170, 171). After the explosives were buried according to instructions, Kerling and Thiel proceeded to New York, where on June 21 they registered at the Hotel Commodore under the assumed names of Edward Kelly and William Thomas (R. 170–172; Gov. Exs. 52, 53, R. 66). The other group had landed at Amagansett, Long Island, on June 13, and likewise proceeded to New York (R. 42).

[9] Thiel thus sought out petitioner on the first day following his arrival in New York on June 21 (see footnote 8, *supra*).

[10] Special Agent Willis testified that when interviewed by Federal Bureau of Investigation agents petitioner had stated that "he had a hunch that is the way he [Thiel] came over," and that "that hunch was substantiated in his mind when he saw Thiel smile" (R. 133).

tioner: "Remember now my name is Bill Thomas and I am anti-Nazi—I am anti-Nazi" (R. 263).[11] He also showed petitioner a draft card bearing the name of "William Thomas" (R. 266). Thiel indicated that he had come from the coast of Florida (R. 142), and petitioner inquired if he had used a rubber boat (R. 134, 148). Petitioner inquired about the bombing of Germany and Thiel said "you know the only time I really was scared to death was when I came over here we got bombed," to which petitioner replied "Then you have come over by submarine, haven't you?" (R. 267). Thiel told petitioner also that Thiel's oldest brother was "quite an influential member of the [Nazi] party;" that he (Thiel) had "three and a half or four thousand dollars" with him; and that "if you have the right kind of connection you can even get dollars in Germany" (R. 265, 268). Petitioner offered to keep Thiel's money for him in petitioner's safe deposit box (R. 269). Thiel, after hesitating, said: "O. K. You can do that"; but nothing was done about it that evening. While at the Twin Oaks Inn Thiel cautioned petitioner against talking too loudly, since they seemed "to arouse much

[11] Petitioner admitted on cross-examination that he had doubted Thiel's statement that he had become anti-Nazi (R. 345), and also that he doubted Thiel's further statement that he had taken the first opportunity to get out of Germany because of conditions there (R. 349). Petitioner in fact testified that he knew at the time that Thiel was a member of the Nazi party (R. 301).

attention around here" (R. 265). From the Twin Oaks they went to the Commodore Hotel bar for a short while. They parted at about 11:00 P. M. Thiel rejected petitioner's suggestion that they meet next time at his room "because I have too many acquaintances there and I don't want them to see me" (R. 269); so they agreed to meet again at the Twin Oaks at 8:00 P. M. the following evening, June 23 (R. 143, 269).

On cross-examination concerning the June 22 meeting petitioner at first testified that when he first met Thiel he had a "hunch" that Thiel was here on a mission for the German government (R. 338). He then denied this, stating that his "hunch" was merely that Thiel had come by submarine (R. 344, 345). He testified further, however, that he had asked Thiel "whether he had come over here to spread rumors and incite unrest,"[12] and then admitted that he therefore must have suspected that Thiel was on a mission for the German Government (R. 349–350). Petitioner's realization of Thiel's purpose is shown likewise by his statements, when interviewed by Federal Bureau of Investigation agents, that he had suspected that Thiel had received the money from the German Government (R. 135–136), that Thiel in fact had told him that he was on a mis-

[12] When interviewed by Federal Bureau of Investigation agents he admitted that he had believed this to be Thiel's purpose (R. 133, 155).

sion for the German Government (R. 154), and that "whatever his mission was, I thought that he was serious in his undertaking" (R. 142).

On the evening of June 23 petitioner and Thiel met again at the Twin Oaks at the appointed hour (R. 270). Thiel said that he was expecting Kerling, and that Kerling had come over with him (R. 271). Petitioner had met Kerling in this country, and knew that he had returned to Germany two years before (R. 138). Kerling was the "leader" of the group with which Thiel had landed on the coast of Florida (R. 40). Federal Bureau of Investigation agents were already on Kerling's trail. Special Agents MacInnes and Willis, who were following him, both testified that they saw him enter the Twin Oaks at about 8:20 P. M. and join petitioner and Thiel at a table, and saw the three converse together until Kerling left at about 9:45 P. M. (R. 67–68, 101–102, 272–273).[13] Kerling told petitioner that he and Thiel had come over together, and petitioner "had a hunch" that Kerling was here for the same purpose as Thiel (R. 143). Special Agents Fisher and Rice arrived and entered the Twin Oaks be-

[13] Until Fisher and Rice arrived, between 9:00 and 9:30 P. M., Willis remained outside the restaurant, but stood at a place from which he could see petitioner, Thiel and Kerling (R. 71, 102). Until then MacInnes was the only agent inside the restaurant (R. 71). After Fisher and Rice arrived, MacInnes, at about 9:25 P. M., left the restaurant to send a message to his office, but he returned in time to follow Kerling when the latter left (R. 67–68).

tween 9:00 and 9:30 P. M., and likewise watched the three conversing until Kerling left (R. 71, 73–74, 76–77, 80). When Kerling left he was followed and arrested by MacInnes, Fisher, Rice, and the Agent-in-charge of the New York Office, Donegan, who had also appeared on the scene (R. 68, 74, 80). Willis remained at the Twin Oaks watching petitioner and Thiel (R. 102). After the arrest of Kerling, Fisher and Rice returned to the Twin Oaks while petitioner and Thiel were still there (R. 74, 78, 80–81). Petitioner and Thiel left the Twin Oaks at about 11:00 P. M. (R. 74, 81, 102). Before that, but not until after Kerling had left, Thiel agreed to entrust his money to petitioner for safekeeping, but asked that he not put it all in the safe deposit box (R. 273)—that he "keep some of the money out in the event I need it in a hurry" (R. 109, 273). The arrangement was that whenever Thiel needed money he was to come to petitioner for it (R. 351). Thiel went to the washroom to remove the money belt from his person and handed it to petitioner on the street after they had left the restaurant (R. 273). Special Agents Fisher, Rice, Foster, and Willis all testified that they saw them leave and that they followed them to Thompson's Cafeteria (R. 74–75, 81, 86, 102). In Thompson's Cafeteria petitioner and Thiel conversed for another twelve or fifteen minutes (R. 75, 81, 84, 102). They agreed to meet again at Thompson's Cafeteria at 8:00 P. M. on

June 25 (R. 143, 274). They parted at the entrance to the Grand Central subway station (R. 75).[14] Thiel was followed and arrested that night (R. 81, 86). Petitioner was followed to his room and his movements were kept under continuous surveillance until his arrest on the evening of June 27 (R. 68–70, 84–85, 103–105, 110, 155–156, 156–157).

Petitioner put Thiel's money belt in a shoe box in his room (R. 87, 275). He made a memorandum, intended for Thiel (R. 276), of the denominations of the bills and of the fact that eight

[14] In summary of the evidence of the first and second overt acts, two witnesses (MacInnes and Willis) testified (R. 67–68, 101–103) that they saw the whole of the first—the meeting and conferring of petitioner, Thiel and Kerling. Two more (Fisher and Rice) testified (R. 73–74, 76–77, 79–80) that they saw the three in conference from between 9:00 and 9:30 P. M. until Kerling left at 9:45 P. M. Willis alone testified (R. 101–102) that he saw the whole of the continued meeting of petitioner and Thiel at the Twin Oaks after Kerling had left. Fisher and Rice testified that they returned in time to see the conclusion of petitioner's meeting with Thiel at the Twin Oaks (R. 74, 80–81). Four witnesses (Fisher, Rice, Foster, and Willis) testified to having followed them from the Twin Oaks to Thompson's Cafeteria (R. 74–75, 81, 86, 102). Four witnesses (Fisher, Rice, Stanley, and Willis) testified to having seen the whole of the second portion of the second overt act—the meeting between petitioner and Thiel at Thompson's Cafeteria (R. 75, 81, 84, 102). None of the agents testified to having heard any portion of the conversation between petitioner, Thiel, and Kerling, or between petitioner and Thiel (see R. 72, 73, 75, 79, 84, 85).

The court below (R. 486) treated the two conferences comprising overt act 2 as having been proved by the testimony of different sets of witnesses, and the same assumption is made

of them were gold notes (Gov. Ex. 66, R. 112).[15] He put $160 between the pages of a book in his room (R. 87, 100, 280) and on the morning of June 25 he put all but $20[16] of the balance in his safe deposit box at 86th Street branch of the Corn Exchange Bank, paying another year's rental in advance, although the box contained nothing else but an empty brown envelope (R. 103–104, 155–156, 159, 278–285). At 8:00 that evening he was at Thompson's Cafeteria for the purpose of keeping his appointment with Thiel, and spent about an hour and a half going back and forth between Thompson's and the Twin Oaks

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by petitioner in his brief here (p. 43). This assumption, as the foregoing summary shows, is erroneous; Agents Fisher, Rice, and Willis *each* testified both to the meeting at the Twin Oaks Inn and to that at Thompson's Cafeteria. Therefore, as shown in the argument, *infra*, pp. 71–74, it is not necessary in this case to reach the question discussed by the court below and decided adversely to the petitioner's contention (R. 486–487), namely, whether the same two witnesses must testify to the whole of the overt act or whether, on the the other hand, different portions of the overt act may be proved by different sets of witnesses.

[15] He doubted whether the gold notes were valid money, and intended to caution Thiel (R. 281).

[16] He deposited this $20, along with a $10 check from Thielmann in partial payment of a debt arising from the Florida delicatessen venture, in his savings account (R. 279, 280). The evidence shows that Thiel, when he left for Germany in March 1941, was indebted to petitioner in the sum of a little over $200, and that Thiel told him he could take payment of this sum from the money which Thiel entrusted to him (R. 245–249, 252–253, 269, 273–274). In petitioner's safe deposit box the eight gold notes, and the further sum of $200, were segregated from the rest of the money (R. 120).

(R. 104–105, 156–157). Thiel of course did not appear, as he was already in custody. The thought entered petitioner's mind that Thiel had been arrested (R. 353). He went to Thompson's and the Twin Oaks again on the evening of June 26 (R. 157), and this time he definitely suspected that Thiel had been arrested (R. 286, 353). He made no attempt as yet to get in touch with Thiel at the Commodore Hotel, although Thiel had told him that he was living there (R. 269). When he returned to his room that evening, Norma Kopp, Thiel's fiancee,[17] was there. She had appeared pursuant to a letter from petitioner, mailed June 25, in which he asked that she come, saying, without mentioning Thiel, that he had "sensational" news for her (R. 176–177, 277–278, 286–287). Although petitioner and Thiel had talked of her at their first meeting and petitioner at that time had offered to write her on behalf of Thiel (R. 263–264, 266), it was not until after the second meeting at which Kerling, the "leader" of Thiel's group, was present, that he wrote to her; and even then he did not mention Thiel's name. When she appeared in person he told her that Thiel was here; that "they came about six men with a

[17] Miss Kopp came from Germany in 1928 (R. 174) and had never been naturalized (R. 200–201). She became acquainted with petitioner and Thiel in May or June 1937 (R. 175, 257–258) and became engaged to Thiel shortly before he returned to Germany in March 1941 (R. 194, 199, 259).

U-boat, in a rubber boat, and landed in Florida;" that they "brought so much money along from Germany, from the German government," and that he was keeping Thiel's money for him in a safe deposit box; and that they "get instructions from the sitz [hide-out] in the Bronx what to do, and where to go" (R. 177–178).

The next morning (June 27) petitioner left a note for "William Thomas" at the Commodore Hotel, saying that Miss Kopp had come and asking that he meet them at Thompson's Cafeteria at 4:00 that afternoon or call them at 9:00 that evening at the Kolping House, the meeting house of a church society for persons of German background (R. 70, 105, 161, 162; Gov. Ex. 67, R. 113, 163). At 10:50 P. M. petitioner was approached at the Kolping House by agents of the Federal Bureau of Investigation and was asked to accompany them to the Bureau's headquarters in New York (R. 69–70, 105). There he was interviewed from about 11:20 P. M. until about 2:00 A. M., by Special Agents Willis and Ostholthoff (R. 106, 152). Both Willis and Ostholthoff testified, in proof of overt act 10 (R. 438), that petitioner told them that the name of the man who had been with him at Thompson's Cafeteria on the evening of June 23 was "William Thomas" (R. 106, 152), that in March 1941, "Thomas" had gone to work in a factory on the West Coast and had not been out of the United States from that time until

petitioner next saw him on June 22, 1942 (R. 106–107, 152–153); that upon being asked if the true name of "William Thomas" was not Werner Thiel, he replied that it was, and that Thiel was using an assumed name because of difficulties with his draft board (R. 106, 153); that with this partial correction he repeated the previous false statements (R. 107, 153); and that he further stated that the money belt which Thiel had given him contained only $200 which Thiel owed him, and that the $3,500 in his safe deposit box belonged to him, and had been obtained from the sale of securities (R. 107–108, 153–154). Willis alone testified to petitioner's having made the further statement that he kept the money in his safe deposit box because he thought it was safer there than in his savings account (R. 108).

Between an hour and an hour and a half after making the first of these false statements petitioner asked if he might speak with Ostholthoff alone (R. 108, 122, 154). They were left alone for between five and ten minutes, during which time petitioner recanted his previous false statements, admitting that he knew Thiel had come from Germany on a submarine on a mission for the German Government, and that he thought that Thiel had come "to stir up unrest among the people and probably spread propaganda" (R. 154–155). Willis then rejoined them, and petitioner

repeated his recantation (R. 108–110), stating that he had lied in order to protect Thiel (R. 108).[18]

Petitioner does not dispute that the evidence showed that he "actually, in the sense of physically, performed the acts alleged in the indictment" (Pet. Br., p. 4). Nor does he apparently question the conclusion of the court below that from all the testimony, including his own, "the jury could properly find that he knew some improper enterprise was afoot and that he intended to aid the enemy in its prosecution" (R. 480).[19] However, he contends that the overt acts submitted to the jury were all legally insufficient in that they "did not openly manifest treason"; that there was failure of compliance with the "two-witnesses" rule; and that the district court abused its discretion in admitting evidence which, in the light of the closeness of the issue before the jury,

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[18] Petitioner on direct examination admitted the making of these false statements, and that he had made them in order "to shield Werner" (R. 292). His admissions at the trial did not, however, extend to admitting any intentional attempt to protect Thiel in the execution of any enemy mission.

[19] In his brief in this Court petitioner makes the bare assertion, without supporting argument, that the evidence "as a whole failed to make out a case" against him (Pet. Br., p. 45). However, he concedes that the crucial issue was whether he "entertained that traitorous intent which is indispensable to the establishment of the crime" of treason, and states that this question of his intent "remained close throughout the trial" (Pet. Br., pp. 4–5).

could not have failed to prejudice him out of all proportion to its probative value (Pet. Br., p. 6).

All these contentions were decided adversely to the petitioner by the court below.

SUMMARY OF ARGUMENT

I. THE OVERT ACTS CHARGED AND PROVED WERE LEGALLY SUFFICIENT

It is not necessary, as the petitioner contends, in a trial for treason to charge and prove overt acts which "as of themselves, and unaided by any other evidence, manifest treason." Treason requires both a purpose to adhere to the enemy, giving them aid and comfort, and an overt act committed in order to effectuate such purpose. The requirement of an overt act is designed to preclude punishment of treasonable thoughts or plans which have not been translated into action, and the requirement of its proof by two witnesses is designed to reduce the danger of convictions based upon perjury. While the authorities sometimes describe an overt act as one which "manifests" the treasonable intent, they lend no support to the petitioner's argument that the act must in itself therefore reveal the actor's state of mind. They mean no more than that the mental design must have ripened into an observable and provable act.

Accordingly, while an overt act must be estab-

lished by the testimony of two witnesses before a conviction for treason can be secured, the second essential element of the crime—a treasonable intent—may be established by any relevant evidence. What any act "manifests" necessarily depends upon knowledge other than that which the act itself conveys. The proper test, we submit, is that the act must be a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort, and must be related to, and in furtherance of, the accomplishment of the treasonable purpose. It is not necessary that the treasonable design shall be successful, nor that the act shall effectively accomplish the giving of aid and comfort to the enemy, nor that it shall in and of itself demonstrate the whole crime.

This understanding of the nature of an overt act is consistent with the early English authorities which were in large part accepted by the framers of the Constitution as guides to the definition of the crime of treason. It is supported in particular by *Lord Preston's* case, a leading English case in which the English treason statutes had been most recently construed at the time of the Federal Convention. It is also consistent with substantially all the American authorities. The petitioner's contention is supported only by

a statement by Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685, 690 (S. D. N. Y. 1919). This statement, which was merely a dictum and did not purport to be carefully considered, is in conflict with the overwhelming weight of authority.

Properly tested, each of the three overt acts submitted to the jury in the instant case was sufficient in law. The jury's verdict, rendered on proper instructions from the trial judge, foreclosed the issue of the petitioner's treasonable intent. In the light of his established intent, and the circumstances surrounding his acts, as proved by competent evidence, the overt acts charged plainly constituted integral parts of a plan to give aid and comfort to the enemy. The first two acts charged, consisting of meetings with the enemy, in themselves afforded aid and comfort, and led to other proven efforts by the petitioner to assist the enemy's hostile mission. The third act submitted (overt act 10), consisting of false statements made to agents of the Federal Bureau of Investigation in order to shield Werner Thiel, one of the German saboteurs, likewise constituted a plain attempt to furnish aid and comfort to the enemy. Factually, the case is stronger than *Lord Preston's* case, in which no aid and comfort was successfully rendered to the enemy, and the overt act charged was totally innocuous on its face.

II. THE PROOF OF EACH OF THE OVERT ACTS SATISFIED THE TWO WITNESS REQUIREMENT OF THE CONSTITUTION AND THE STATUTE

Overt act 1 was concededly proved by the testimony of two witnesses. As to overt act 2, the petitioner contends that the proof was deficient in that different portions of the act were observed by different sets of witnesses. The two-witness requirement, however, does not mean that the same two witnesses must testify to the whole overt act, but rather that, if the act is separable, each of the separable portions must be proved by the testimony of two witnesses. The court below correctly so held. However, the question is not in fact presented by the record, since actually the whole of the overt act was proved by the testimony of the same two witnesses and more.

The petitioner contends that the proof of overt act 10 was deficient since only one witness testified to the making of a portion of one of the five false statements comprising the overt act. However, the court below correctly held that the substance of the act was fully proved by both witnesses who testified to its commission, and that under the circumstances the phrase omitted in the testimony of one of the witnesses was immaterial.

Furthermore, any deficiency that might otherwise have existed in the proof of overt act 10 was

supplied by the complete testimony of the petitioner himself, as a witness in his own defense. While the confession of a defendant in a treason case, made out of court, will admittedly not in itself supply the requirement of testimony by two witnesses to the commission of an overt act, there is no reason in principle or authority why the defendant's own testimony in court as to the commission of an overt act should not serve as the testimony of one of the necessary two witnesses to the commission of that act.

Application of the doctrine of the *McNabb* case (*McNabb* v. *United States*, 318 U. S. 332) to the testimony of the witnesses who established the commission of overt act 10 is urged by the petitioner for the first time in his brief in this Court. Even if the false statements attributed to the petitioner could be regarded as having been made during a period of illegal restraint, they constituted the operative facts of a crime charged against him, rather than a confession secured under circumstances implying duress. The voluntary and deliberate character of the petitioner's false statements is not disputed. Under these circumstances the doctrine of the *McNabb* case has no application.

III. THE PETITIONER'S ASSIGNMENTS OF ERROR IN THE CONDUCT OF THE TRIAL ARE WITHOUT MERIT

A copy of the Constitution of the United States, found in the possession of the petitioner

and having the treason section marked by him in his own hand, was properly admitted in evidence on cross-examination to test his treasonable intent and also his credibility in the light of his testimony that he had at no time been particularly interested in the law of treason. A question whether he had been warned by a relative against continuing to write letters unfriendly to the United States was likewise properly permitted in order to refresh his recollection, in view of his repeated denials on cross-examination that he had written any letters of such a character. As the petitioner admitted having received a letter containing such a warning, the question was not one based upon an assumed state of facts not proved. In any event, the rulings of the trial court in these respects were fully within its discretion in determining the proper scope of cross-examination of a defendant who takes the stand as a witness in his own defense.

There was likewise no abuse of discretion on the part of the trial court in permitting the introduction of concededly competent evidence as to the nature and scope of the mission of the German saboteurs to whom the petitioner was charged with having given aid and comfort. The right of the Government to prove the enemy character of the saboteurs is not disputed, and it was for the trial court to determine at what point, if any, the evidence on the issue became unduly cumulative and prejudicial to the petitioner.

ARGUMENT

I

The Overt Acts Charged and Proved Were Legally Sufficient

The basic contention of the petitioner is that overt acts, to be legally sufficient to sustain a conviction for treason, must be acts which "as of themselves, and unaided by any other evidence, manifest treason" (Pet. Br., p. 20).[20] In support of this contention the petitioner cites and quotes from cases, both English and American, in which in one form or another it is stated that a conviction for treason must be sustained by proof of an overt act which "manifests" the treason, or the treasonable intent. The pertinence of these cases does not lie in the meaning which the petitioner attributes to them. While they make clear that treason must be "manifested" by an overt act, they do not support the petitioner's contention as to the meaning of the word "manifest" as used in the law of treason.

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[20] Consistently with this contention, the petitioner's brief examines each of the three overt acts submitted to the jury and argues that none of them meets the constitutional requirement, in that each fails "openly to manifest treason" (Pet. Br., pp. 18–38). Overt acts 1 and 2 are categorized as involving "a mere meeting with an enemy" (Pet. Br., p. 35). Overt act 10 is criticized not only for its failure "openly to manifest treason" but also as falling within the doctrine "that mere words may not ordinarily constitute an overt act in treason" (Pet. Br., p. 36).

We submit that the petitioner has misconstrued the cases dealing with the legal sufficiency of overt acts of treason, and that, properly tested, each of the three overt acts submitted to the jury in this case was sufficient to sustain the conviction.[21]

A. THE OVERT ACTS, TO BE LEGALLY SUFFICIENT, NEED NOT SHOW ON THEIR FACE THE TREASONABLE INTENT

In considering the petitioner's contention that the overt acts must "as of themselves, and unaided by any other evidence, manifest treason," the court below made an extensive analysis of the relevant historical materials and concluded—correctly, we submit—that this restrictive conception of the overt act requirement is warranted neither by considerations relating to the nature of the

[21] As the petitioner points out (Pet. Br., p. 18), if any one of the three overt acts had been legally insufficient the trial judge would have committed reversible error in submitting it to the jury, since the jury, rendering only a general verdict without special findings as to the several overt acts, might have relied only on the legally insufficient act as a basis for its verdict. There is, however, no inconsistency between this rule and the rule noted by the court below in its opinion (R. 481) that a number of legally sufficient overt acts may properly be submitted to the jury even though the proof establishes only one of them. The trial court correctly charged the jury that the Government, to secure conviction, must "prove at least one of the three overt acts charged in the indictment by the testimony of two witnesses" (R. 442).

crime of treason nor by its history. The court said: "Any interpretation of Art. 3, § 3 [of the Constitution], which would require the overt act itself to demonstrate the treasonable intent would erect a requirement of quantity of proof into a limitation on the crime itself, rendering it as a practical matter almost nonexistent. * * * if such separation of proof into component parts is necessary, it would follow that the overt act would have to be proved first and the jury then pass upon the sufficiency of the intent thereby shown before any other evidence of intent be admitted. * * * In effect the overt act would then have to comprehend the whole treason, and proof *aliunde* of intent would be superfluous" (R. 485).

Concededly, conviction for treason requires both a treasonable intent and an overt act committed in order to effectuate such intent. The requirement of an overt act is designed to preclude punishment for treasonable plans, or wishes, or hopes, which have never transcended the realm of thought or academic verbal expression. A purpose of giving aid and comfort to an enemy, so long as it is not translated into action, is not punishable as treason. In this respect treason is no different from other crimes. As Sir James FitzJames Stephen put it: "No temper of mind, no habit of life, however pernicious, has ever been treated as a crime, unless it displayed itself in some definite overt act. * * * The

reasons for imposing this great leading restriction upon the sphere of the criminal law are obvious. If it were not so restricted it would be utterly intolerable; all mankind would be criminals, and most of their lives would be passed in trying and punishing each other for offences which could never be proved." Stephen, *A History of the Criminal Law of England,* 1883 ed., vol. 2, p. 78.

Clearly, therefore, a traitorous thought which has not been translated into a deed does not now constitute treason. However, this incontrovertible proposition of law has often been stated in a way which has tended to confuse rather than to clarify. The petitioner cites authorities in which it is loosely said that the overt act must "manifest" the treasonable intent of the actor. But the word "manifest," as commonly used in this connection, is ambiguous. The petitioner seeks to draw from it a conclusion that the act must in itself reveal the actor's state of mind. We submit, to the contrary, that it means no more than that the mental design must have ripened into a physical, observable, and provable act.[22] As we undertake to show later (*infra,*

[22] This meaning, for instance, was observed by Judge Mayer when, in *United States* v. *Fricke*, 259 Fed. 673 (S. D. N. Y. 1919), he charged the jury that a treasonable intention "must be manifested by what is termed an overt act," and, at the same time, that an overt act "in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime."

pp. 41–53), neither petitioner's quotations nor the cases from which they are taken support his conclusion that the judges, English and American, who have used the word "manifest" intended the restriction for which he contends.

We believe that the covert intent and the overt act, both necesary to the proof of treason, are separate and distinct, complementary and not overlapping elements of the offense; that while each must be proved, each may be proved by any relevant evidence which satisfies the jury (subject only to the constitutional requirement that the necessary overt act must be proved by the testimony of two witnesses); and that the proof of the commission of the overt act is not required to comprehend also the proof of the treasonable intent. It is difficult to imagine an act which in itself, without resort to other evidence, would *per se* establish the actor's treasonable intent. Let us suppose, for example, that in the present case it had been charged and proved that the petitioner had given Thiel and Kerling information as to the location of vital factories, airports, railroad terminals, or bridges. On the petitioner's test even such a showing would presumably be insufficient, since the act of communicating information would not in itself "openly manifest" a treasonable intent. To "manifest treason," in the petitioner's sense, the act would have to reveal also the petitioner's allegiance to

the United States, his knowledge of the enemy character of Thiel and Kerling, and his intent to give them aid and comfort as enemies of the United States. Even the act of giving them vital military information might, so far as the act itself showed, have been committed without knowledge that they were enemies, or without purpose other than idle gossip or boastfulness. But if petitioner's test were followed, other competent and convincing evidence of petitioner's knowledge and purpose would be inadmissible to place the act in its proper setting, and the act of informing the enemy would, as a matter of law, have to be held insufficient as an overt act of treason and withdrawn from the consideration of the jury.

We submit that the mere expression of the petitioner's proposed rule indicates its unsoundness. What any act "manifests" must depend on knowledge other than that which the act itself conveys. Suppose that Thiel had handed money to the petitioner across the table, in open view, at the Twin Oaks Inn. To Agent Willis or Agent MacInnes, watching the action, it might be readily apparent that the petitioner was attempting to aid and comfort an enemy by receiving funds for concealment, for they knew how Thiel had arrived and had reason to suspect the nature of his mission. To a waiter at the Inn the same act would have carried no such significance; it would have evoked

not even a suspicion of treasonable intent. Even the act of assisting Thiel and Kerling in their landing on Ponte Vedra Beach in Florida would "manifest" treason only if to the observer their enemy character were made plain by some such patent fact as their disembarking from a German submarine or their wearing German army uniforms. It must follow from the petitioner's test that even if he had openly received and harbored Thiel and Kerling upon their arrival, he would have committed no legally provable overt act of treason if they had arrived in ordinary American business suits.

Contrary to the petitioner's test, we believe that the relevant authorities, including those cited by him, support the view that an overt act need "manifest" treason only in the sense of showing to the jury, in the light of all the evidence in the case, that a treasonable design has been carried forward to the point of action in its furtherance. Its character and significance are to be judged not by what, to one observer or another, it may appear to be, but by its actual place in the effectuation of a treasonable design; and this is to be determined not merely from the testimony of those who watched it and gave evidence of its commission but from all the relevant evidence. The act of raising one's hand may appear to any observer wholly innocent; yet it may be the pre-

arranged signal to a confederate to assassinate a public official. Though such an act may superficially seem innocent, the Government is entitled to prove, by any other available evidence, either direct or circumstantial, that it is not what it appears to be but is in fact an act in furtherance of a treasonable design.

By this we do not of course mean that any act, however insignificant or unrelated to the accomplishment of a treasonable purpose, is a legally sufficient "overt act" merely because the actor at the time was engaged in the prosecution of such a purpose. The act must, we believe, be a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort.[23] It must be related to,

[23] It is well established that, to constitute treason, the treasonable design need not have been successfully accomplished. See *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case No. 15,254 (C. C. N. D. Cal., 1863), in which Field, C. J., in his charge to the jury (at p. 24), cited with approval Foster, *Treatise on Crown Law*, to the following effect:

"And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended."

Cf. *Rex* v. *Stone*, 6 Term Rep. 527, 529 (1796); *Rex* v. *Hensey*, 1 Burr. 642 (1758); *Trial of David Gregg*, 14 How. St. Tr. 1371, 1376 (1708); *Trial of David Maclane*, 26

and in furtherance of, the successful or anticipated accomplishment of the treasonable design. If the act be proved by testimony of two witnesses, its tendency to effectuate the design of aiding the enemy may be shown by any other competent evidence.

Furthermore, we submit that the authorities have not, as implied by the petitioner, crystallized those forms of aid and comfort to the enemy which are to be regarded as treasonable. The illustrations generally offered by the early judges and textual authorities naturally involved acts giving aid and comfort in a most obvious and extreme way;[24] but these illustrations have not been expressed, nor is there any reason to believe that they were intended, as exhaustive. The type of aid and comfort sought to be given may vary from case to case. As times and the techniques of warfare change the methods by which an enemy may be aided and comforted change also. The courts must decide whether, in the context of the whole case, the overt acts charged were an integral part of a program which was designed to, and tended

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How. St. Tr. 721, 795 (1797); *United States* v. *Doe*, 26 Fed. Cas. 907, Case No. 15,584 (C. C. D. C. 1814); *United States* v. *Pryor*, 27 Fed. Cas. 628, Case No. 16,096 (C. C. D. Pa. 1814); *Trial of Arthur Thistlewood*, 33 How. St. Tr. 682, 921 (1820).

[24] Cf. the illustrations given by Foster and Blackstone, cited at pp. 24–25 of petitioner's brief.

to, give aid and comfort to the enemy as such, in the sense of assisting the enemy in a hostile design, or facilitating its execution. If an act appears on all the evidence to be of such a character, and its commission is proved by two witnesses, then it is an overt act sufficient to support a conviction of treason.

The petitioner argues that if our construction of the term "overt act" is correct, "the two witness rule becomes meaningless verbiage and the protection sought to be afforded the accused is mere illusion" (Pet. Br., p. 23). But the history of the two witness rule does not support his contention. In providing that, unless the accused confesses his treason in open court, he cannot be convicted except "on the Testimony of two Witnesses to the same overt Act," the framers of the Constitution imposed a substantial safeguard against convictions based upon perjury. Under the English law as it stood at the time of the Federal Convention, the two witness rule in treason was satisfied by the testimony of one witness to one overt act and another to a different overt act (7 William III, c. 3, sec. 2; *Lilburne's Trial*, 4 How. St. Tr. 1269, 1401 (1649); *Trials of the Regicides*, 5 How. St. Tr. 947, 978 (1660); see VII Wigmore, *Evidence* (3 ed.), sec. 2038). The constitutional provision as originally proposed to the con-

yention merely required proof by the testimony of two witnesses, and Mr. Dickenson "wished to know what was meant by the 'testimony of two witnesses' whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt act ought to be expressed as essential in the case" (Madison, *Debates in the Federal Convention* (International Edition, 1940), p. 431). Later in the debate the following occurred (p. 434):

> It was then moved to insert after "two witnesses" the words "to the same overt act."
>
> Doct. FRANKLIN wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.
>
> Mr. WILSON, much may be said on both sides. Treason may sometimes be practised in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.
>
> On the question—as to same overt act (N. H. ay. Mas. ay. Ct. ay. N. J. no. P. ay. Del. ay. Md. ay. Va. no. N. C. no. S. C. ay. Geo. ay.).

Still later the words "or on Confession in open Court" were added by an amendment which was adopted by a vote of 7 to 3, "the negative States thinking the words superfluous." *Id.*, p. 434.

If, as the petitioner urges, the overt act in itself must prove the whole crime of treason, including the accused's treasonable intent, then the constitutional requirement means that all the essential elements of the prosecution's case must be proved by two witnesses—the same two witnesses. There is no indication whatsoever that, in requiring the testimony of two witnesses to the *same* overt act, the framers of the Constitution intended to extend this requirement of proof to every element of the offense. As the court below pointed out, acceptance of the petitioner's contention "would mean an extension of the scope of the two-witness rule beyond anything heretofore known in its varied history * * *" (R. 485).

On the other hand, rejection of the petitioner's contention does not, as he suggests (Pet. Br., p. 23), render "the two witness rule * * * meaningless verbiage and the protection sought to be afforded the accused * * * mere illusion." In view of the seriousness of the offense of treason, and the susceptibility of treason trials to the dangers of perjury and inflamed emotions,[25] the framers of the Constitution by the two witness rule

[25] See the observation of Dr. Franklin in the Federal Convention, quoted *supra*, p. 39. The policy of the two witness rule, as stated by Sir William Blackstone (*Commentaries*, III, 358), was to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages."

understandably endeavored to protect the rights of the accused by establishing a quantitative measure of proof unlike that applicable in prosecutions for lesser offenses. But such a quantitative test was feasible only with respect to the "overt act" element of the crime. Acts are inherently capable of being perceived and evidenced by the testimony of direct witnesses; intent, on the other hand, is generally not susceptible of this type of proof. The existence of a given intent can ordinarily best be gathered from other directly provable facts, such as letters or statements by the accused to others, confessions not made in open court, or even wholly circumstantial evidence. There is nothing in the history of the two witness rule which suggests that the quantitative measure made applicable to the proof of overt acts was intended to supersede the ordinary and appropriate rules of evidence under which intention has always been proved in courts of law. The authorities support our view.[20]

Since the constitutional provision is modeled upon the English law of treason, it has always been recognized that the elements of the offense are to be defined in light of the English law as of

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[20] *Case of Fries*, 9 Fed. Cas. 826, Case No. 5126, at p. 909 (C. C. D. Pa. 1799): "Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact"; *Trial of David Maclane*, 26 How. St. Tr. 721, 797–798 (1797); *Halsbury's Laws of England* (2d ed.), Vol. VI, p. 424. Thus the treasonous intent may be proved by a confession, *Res-*

the time the Constitution was adopted.[27] As the court below pointed out, the debates in the Federal Convention "show that the framers were strongly influenced by the English law of treason * * *, and it is reasonable to suppose that they intended to give Art. 3, § 3, the same scope, as well as in effect the same phraseology, as the English statute then most recently construed in the famous *Lord Preston's* case * * *" (R. 482).

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publica v. *Roberts*, 1 *Dall.* 39, 40 (1778); *Case of Fries*, *supra*, at pp. 909, 914; *United States* v. *Lee*, 26 Fed. Cas. 907, Case No. 15,584 (C. C. D. C. 1814); *Trial of Francis Willis*, 15 How. St. Tr. 614, 623–625 (1710); it may be inferred from statements antecedent, *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case No. 15,254, at pp. 24, 26 (C. C. N. D. Cal. 1863); *Trial of Sir William Parkyns*, 13 How. St. Tr. 63 (1696), or contemporaneous with or subsequent to the overt act, *Respublica* v. *Roberts*, 1 *Dall.* 39, 40 (1778); *Trial of Ambrose Rookwood*, 18 How. St. Tr. 139, 213–221 (1696); or it may be deduced from proof of knowledge which accompanied the commission of the overt act or by proof of conduct, such as other overt acts which, while not alleged in the indictment, serve to illuminate the intent that accompanied the commission of the overt act laid in the indictment. *Respublica* v. *Carlisle*, 1 Dall. 35, 38 (1778); *Trial of Sir John Wedderburn*, 18 How. St. Tr. 426, 427 (1746); *Trial of Sir Richard Graham* (*Lord Preston's Case*), 12 How. St. Tr. 645, 727–729, 740 (1791); *Trials of the Regicides*, 5 How. St. Tr. 947, 976–977 (1660).

[27] *United States* v. *Burr*, 25 Fed. Cas. 55, Case No. 14,693, at p. 159 (C. C. D. Va. 1807); *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case No. 15,254, at p. 21 (C. C. N. D. Cal. 1863); *United States* v. *Hanway*, 26 Fed. Cas. 105, Case No. 15,299, at pp. 126–127 (C. C. E. D. Pa. 1851); McKinney, *Treason Under the Constitution of the United States*, (1918) 12 Ill. L. Rev. 381, 386.

Because *Lord Preston's* case (*Trial of Sir Richard Grahme*), 12 How. St. Tr. 645 (1691), is so significant a landmark in the law of treason, and because it involved the basic issue presented by the case at bar, the case warrants detailed analysis. Lord Preston was charged with giving aid and comfort to the enemy when England was at war with France. The indictment alleged as an overt act of treason that on December 30, 1690, Lord Preston and others hired a small boat at Surrey Stairs in the County of Middlesex, England, to take them to another vessel which would carry them to France. It was alleged that the defendants were proceeding to France in order to communicate military information to the enemy. The proof showed that, after the vessel set sail for France, Lord Preston and his associates were arrested when the vessel was in the County of Kent, England, and that papers containing military information of value to the enemy were there found on the person of Lord Preston's servant.

Since the indictment laid treason in Middlesex, Lord Preston contended that the proof was inadequate since there was no showing that a legally sufficient overt act of treason had been committed in that county. It was held, however, that the act of boarding the boat in the County of Middlesex was a sufficient overt act of treason. The colloquy between the defendant

and the judges, including Lord Chief Justice Holt, is most illuminating (12 How. St. Tr., at pp. 727–729):

> L. C. J. Holt. My lord, as to the first matter that your lordship makes a question upon, whether there be any act of treason proved in Middlesex, that does depend upon the proof of your lordship's being concerned in the papers; for if your lordship had an intention in carrying these papers into France, which speaks a design to invade this realm, your lordship took boat in Middlesex at Surrey-Stairs, in prosecution of that intention, there is an over-act in the county of Middlesex.
>
> L. Preston. Your lordship, and the gentlemen of the jury observe, these papers were not found upon me.
>
> L. C. J. Holt. No, my lord; but if it be proved that your lordship had an intention to carry these papers into France, and took boat in order to go with them into France, in the county of Middlesex, wherever your lordship acted in order to that design, that is treason, and there you are guilty. It is a treason complicated of several facts, done in several places.
>
> L. Preston. My lord, I humbly desire to know, whether they have been proved to be my papers?
>
> L. C. J. Holt. That is a question that must be left to the jury upon the evidence.

L. PRESTON. Nobody swears they are mine, nor were they found upon me.

L. C. J. HOLT. But what I am speaking to your lordship, is in answer to your question about the place; for you say, that there is nothing proved done in the county of Middlesex; now the question is, whether your lordship had a design to go to France with these papers? If you had, and if your lordship did go on ship-board in order to it, your taking boat in Middlesex in order to go on ship-board, is a fact done in the county of Middlesex.

L. PRESTON. It is not proved by any witnesses that I designed to go into France.

L. C. J. HOLT. That is before the jury upon the evidence.

L. PRESTON. I hope your lordship, and the jury will observe it is not proved, and in the next place, there are no papers taken upon me; with humble submission, there is no proof of any such thing.

L. C. J. HOLT. Well, how far your lordship was concerned in these papers, and whether you were going with them into France, is to be left, upon the evidence that hath been heard, to the consideration of the jury.

L. PRESTON. But I humbly submit that.

L. C. J. HOLT. Have you any more to say?

L. PRESTON. As to what I offer, that nothing has been proved in Middlesex, I hope your lordship will take it to be a point

of law, and then it ought to be argued; and I desire I may have counsel.

L. C. J. HOLT. No, it is a matter of fact only; but if you please, the rest of my lords the judges may give you their opinion: for this is a question upon a supposition that your lordship was guilty of a design of going into France, and this with a purpose to depose the king, and alter the government; then the question is upon such a supposition that you were guilty of that design, whether you were guilty in Middlesex or no?

L. PRESTON. My lord, they have not proved that design.

L. C. J. HOLT. We do not say it is taken for granted now, but it is a question upon a supposition. Now, my lord, I'll tell your lordship in short my opinion, the rest of the judges will tell you theirs: I am of opinion, if your lordship had such a design to go with these papers into France, and these papers were formed by you, or you were privy to the contents of them, then it is plainly proved, that you went into a boat in the county of Middlesex, in order to carry on this design, and that will make it a good indictment, and here is a plain overt-act of high-treason in Middlesex.

L. C. J. POLLEXFEN. I am of the same opinion; for your fact as to this particular point in law stands thus: You are indicted of high-treason in two points; one is, for conspiring to depose the king and queen,

and alter the government: and the other is, for aiding and assisting the French king, and his subjects, declared enemies, and in open war against the king and queen, and to invite the enemies of the kingdom to invade the kingdom. Now this design, and this help and assistance, are written in these papers; for they are instructions for the carrying on of this design. You, my lord, are the person that is charged to go with these papers to help on this design; you began your journey in the county of Middlesex, for according to the evidence, you took water at Surrey-Stairs, which is in the county of Middlesex, and every step you made in pursuance of this journey, is treason, where-ever it was: So then here is a sufficient proof of a fact in Middlesex.

L. PRESTON. That, my lord, is a point of law, and I humbly desire your lordship, that I may have counsel in this case. It is not proved by any body, that I said I would go into France; and in the next place, it is not proved that I had these papers about me; there has been no evidence given that I did take water with an intention to go with these papers into France.

L. C. J. HOLT. The Jury are to be judges of that.

And Lord Chief Justice Holt charged the jury (12 How. St. Tr., at p. 740) as follows:

Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence

> that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and make use of the papers to that end, then every step he took in order to it, is high-treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high-treason, as the going a ship-board in Surrey, or being found on ship-board in Kent, where the papers were taken.

Clearly, therefore, *Lord Preston's* case refutes the argument made here by the petitioner. The overt act found to be sufficient in that case was in itself completely innocent and harmless; it plainly did not "openly manifest" Lord Preston's treasonous disposition. The case establishes that the overt act must be in furtherance of the treasonous intent (which the jury could find from all the evidence), not that the act must itself prove such intent. The petitioner in his brief (pp. 28–29) erroneously assumes that Lord Preston was found to have committed "a clear overt act of treason" in carrying papers into France to incite an invasion of England, and that therefore his boarding a boat in Middlesex was preparatory thereto and hence a sufficient overt act. It was neither alleged nor proved that Lord Preston carried papers into France; he was apprehended while still in England. As is un-

mistakably revealed by the portion of Lord Chief Justice Holt's charge to the jury quoted above (and quoted also in the petitioner's brief, at p. 28), the overt act of boarding a small boat in Middlesex was held to be legally sufficient if the jury were satisfied from the evidence that the defendant "was privy to this *design*, contained in these papers, and was going with them into France, there to incite an invasion of the kingdom * * *." [Italics supplied.]

Lord Preston's case does not stand alone in showing that, notwithstanding the ambiguity of expression in some of the English cases, the overt act was not required itself to disclose the accused's treasonous intent. In the *Trial of David Maclane*, 26 How. St. Tr. 721 (1797), the defendant was charged with giving aid and comfort to France during the French and Indian War. One of the overt acts alleged in the indictment was that, having acquired information of military value concerning the city of Montreal, "he departed from the parish of Quebec towards foreign parts, with intent to communicate it to the enemy" (p. 793–794). In charging the jury that each of the overt acts alleged was sufficient to prove treason, Chief Justice Osgoode of the Court of King's Bench for Montreal said (p. 795):

> So in the case of treason, if a traitorous intention is disclosed by words or writings, and they are followed up by any acts tend-

ing to execute such design, although it be not complete, it is sufficient to ground a charge of treason, and it is left to the oaths and conscience of a jury to say with what view such a step was taken, although the party is stopped short before the final purpose was carried into effect; for, common sense tells us, we ought not to wait till the mischief is completed.

In *Vaughan's Case*, 2 Salk. 634, 635 (1696), it was held that the mere act of cruising in an English vessel on the high seas was a sufficient overt act of adhering to the king's enemies if the purpose of the accused, as shown by the evidence, was to attack ships belonging to allies of England. Of the English authorities relied upon by the petitioner, the comparatively recent case of *Rex* v. *Casement*, [1917] 1 K. B. 98, is typical. Lord Reading there charged the jury as follows: "Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled." The petitioner finds support in this language for his contention that the overt act must itself establish a treasonable intent. But this language, like that contained in the other cases quoted in the petitioner's brief, is equivocal and unilluminating. The petitioner fails to cite a single English case where it was held, as he contends here, that an act innocent on

its face but shown by all the relevant evidence to be an act of treason was not sufficient in law to constitute an overt act. He relies solely upon loose, ambiguous language which neither supports nor refutes his interpretation of the overt act requirement.

Nor do the American authorities lend substantial support to the petitioner's contention. He places much stress upon the dictum of Judge Learned Hand in *United States* v. *Robinson,* 259 Fed. 685, 690 (S. D. N. Y. 1919), expressing "the gravest doubt of the sufficiency" of an overt act consisting of "a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent." The court below pointed out that "just how far he [Judge Hand] would have gone, if pressed to it, in applying his thought is not clear" (R. 485). It may be noted, also, that Judge Hand referred only to the charge of Lord Reading in *Rex* v. *Casement, supra*—a charge which, when read as a whole, falls far short of sustaining the view of the law which Judge Hand ascribed to it; he made no apparent attempt to review or analyze *Lord Preston's* case and the other relevant historical authorities. Plainly, therefore, the dictum in *United States* v. *Robinson, supra,* is not entitled to the weight which should be given to a considered judgment of Judge Hand.

United States v. *Fricke,* 259 Fed. 673 (S. D.

N. Y. 1919), arose before another judge of the same court at about the same time as the *Robinson* case. There one of the overt acts submitted to the jury charged the defendant with borrowing money from a bank with intent to give it to an enemy spy. The "act" charged was the act, wholly innocent in itself, of borrowing money from a bank. Judge Mayer, apparently not entertaining the doubts which troubled Judge Hand, instructed the jury that "an overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime" (259 Fed. at 677). In *United States* v. *Lee*, 26 Fed. Cas. 907, Case No. 15,584 (C. C. D. C. 1814), the court instructed the jury that the act of the defendant in purchasing food with the intention of delivering it to the enemy was a sufficient overt act of adhering to the enemy. And in *United States* v. *Pryor*, 27 Fed. Cas. 628, Case No. 16,096, at p. 630 (C. C. D. Pa. 1814), Justice Washington charged the jury that "if the intention of the prisoner was to procure provisions for the enemy, by uniting with him in acts of hostility against the United States or its citizens, which is chiefly pressed against him by the district attorney; then, indeed, it must be admitted, that his progressing towards the shore, was an overt act of adhering to the enemy, although no act of hostility was in fact committed." See also *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case

No. 15,254. In the course of his charge to the jury in *Case of Fries*, 9 Fed. Cas. 826, Case No. 5,126, at p. 914, Justice Iredell stated:

> It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act; but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. *The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is conclusive.* [Emphasis supplied.]

And Judge Peters similarly charged the jury (p. 916):

> I think the overt act and the intention constitute the treason; for without the intention the treason is not complete. If a man goes for a private purpose, to gratify a private revenge, and not with a public or general view, it differs materially. *The intention may possibly be gathered at the place where the act was committed, or it may not; if not, evidence is admissible to prove it elsewhere.* [Emphasis supplied.]

In the recent case of *Stephan* v. *United States*, certiorari denied last Term, 318 U. S. 781 (see also 319 U. S. 783, 318 U. S. 746, 319 U. S. 423), among the overt acts sustained by the circuit court of appeals were the acts of the defendant in escorting an enemy from the house of a friend to the defendant's automobile, and in subsequently concealing the enemy's identity by referring to him in the presence of others as "a friend from Milwaukee" (133 F. (2d) 87 (C. C. A. 6, 1943)). Neither of these acts "openly manifested" the defendant's treasonous intent; both were wholly innocent in themselves.

We submit that the authorities do not support the petitioner's contention, and that, on the contrary, considerations of reason and authority substantiate the conclusion that "when the traitorous intention and design are clearly manifested and proved, any act which is related to the design and tends to effectuate it, is such an overt act as the definition of treason requires" (McKinney, *Treason under the Constitution of the United States*, (1918) 12 Ill. L. Rev. 381, 396).

B. EACH OF THE OVERT ACTS SUBMITTED TO THE JURY WAS LEGALLY SUFFICIENT TO SUSTAIN THE CONVICTION OF PETITIONER

From the verdict of the jury, rendered after proper instructions from the trial court, it must be assumed at this stage of the case that there

is no question but that the petitioner committed overt acts 1, 2, and 10, as charged in the indictment,[28] and that in so doing he had the treasonable intent necessary to a conviction for treason. As previously pointed out (*supra*, p. 21), the petitioner does not seriously question the conclusion of the court below that from all the testimony, including his own, "the jury could properly find that he knew some improper enterprise was afoot and that he intended to aid the enemy in its prosecution" (R. 480).[29] The evidence as to the knowledge which the petitioner gained from Thiel at their first meeting on June 22nd (*supra*, pp. 11–13) was fully sufficient to warrant a conclusion by the jury that the petitioner, in his later actions, intended to aid known enemies of the United States on a mission which, even though he might not have appreciated its exact scope and purpose, was obviously hostile to the United States. The trial judge correctly charged the jury that they must be satisfied beyond a reasonable doubt that the petitioner intended to aid Thiel and Kerling as enemies of the United States, and not merely out of personal friendship.[30] The jury's verdict, therefore,

[28] The petitioner does not dispute that the evidence established that he "actually, in the sense of physically, performed the acts alleged in the indictment" (Pet. Br., p. 4).

[29] See footnote 19, *supra*, p. 21.

[30] Specifically, the judge charged the jury that unless they were "satisfied beyond a reasonable doubt that the defendant's intention was to aid Thiel and Kerling, or either of

based as it was on adequate evidence and rendered under a proper charge as to the law, forecloses any contention that the overt acts were committed without the necessary treasonable intent. The sole question on this branch of the case is whether the acts charged and proved to have been done with this treasonable intent were "overt acts" as that term is used in the Constitution and in the statute under which the petitioner was convicted.

Under the preceding heading we have explained our view of the proper test to be applied in determining the legal sufficiency of overt acts in treason cases. As we have indicated (*supra*, pp. 35–36), an act, to be legally sufficient as an overt act, must be an act which is a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, and to give them aid and comfort. Applying this test, we submit that each of the three overt acts here submitted to the jury was clearly sufficient in law. Each of the acts was directly related to, and in furtherance of, the accomplishment of the petitioner's treasonable design. Each translated the petitioner's treasonable intent and purpose of

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them, as enemies of the United States and agents of the German Reich, the defendant must be acquitted" (R. 439), and also that if the jury should find "that the acts testified to were committed solely out of friendship for Thiel and Kerling, or either, and without any intent or purpose to assist them in their hostile purposes, the defendant should be acquitted" (R. 440–441).

giving aid and comfort to the enemy into an objectively provable overt act.

Overt acts 1 and 2 charged that on the evening of June 23rd the petitioner did "confer, treat, and counsel with" first Thiel and Kerling together, and later with Thiel alone.[31] The witnesses who watched these meetings, and who testified at the trial that they had occurred, did not attempt to show at the trial what was said at the meetings. There was no need so to do, since the overt acts charged were the meetings, rather than the words said at them. But a large amount of other competent evidence was introduced from which the jury could find the significance of the meetings, as integral parts of a treasonable program, and as steps in furtherance of that program.

Let us consider the setting in which the meetings occurred. Thiel and the petitioner had been

[31] The petitioner asserts (Pet. Br., p. 20) that although overt act 1 alleged that he "did meet * * * and did confer, treat, and counsel with" Thiel and Kerling, and overt act 2 that he did "accompany, confer, treat, and counsel" with Thiel, in neither instance did the proof establish that he "did treat and counsel" with them, so that for the purposes of their legal sufficiency the acts must be treated as charging only that petitioner "met and talked with Thiel and Kerling or Thiel alone." It may be doubted whether the charge of "treating and counselling with" the enemy adds anything of significance to the charge that the petitioner "met and talked with" them; but even if these overt acts as charged in the indictment must, as the petitioner suggests, be regarded as modified by the proof, their sufficiency as overt acts remains unaffected, for they were still overt acts in furtherance of petitioner's treasonable design.

close friends for many years. They had lived together and had been engaged in business together. From these associations the petitioner knew that Thiel was an alien enemy, and that his sympathies lay with Germany (R. 251–252). He knew that Thiel in March 1941 had left the United States for Germany in anticipation of war between the two countries, and with the obvious desire to be on the German side in such a war (R. 251). Petitioner corresponded with Thiel in Germany (R. 328–329), and the tenor of his letters revealed enthusiasm and admiration for the German cause (R. 117–118, 331–332, Gov. Ex. 68).

In June of 1942 Thiel reappeared, mysteriously and furtively. His method of approach to the petitioner was in itself suspicious. A strange voice called petitioner's name from the hall of his rooming house, and on his failure to respond an unsigned note, in an unknown hand, was slipped under his door, directing him to meet "Franz from Chicago" at a named hour and place (R. 261–262). Petitioner, though he testified that he knew no "Franz from Chicago", and had been unwilling even to answer the unknown voice calling him (R. 262), nevertheless made his appearance at the rendezvous. According to his own testimony, he was startled, and asked several questions, only to be put off with evasive and noncommital replies (R. 263, 267). They talked together for several hours. Thiel mentioned the

money which he had brought from Germany, and expressed reluctance at carrying it around with him (R. 268). Petitioner offered to take charge of it and put it in his own safe deposit box. Thiel, while apparently agreeable to this, was still noncommittal (R. 269), and nothing was done about it that night. They talked of Thiel's fiancee, Norma Kopp, and when Thiel expressed interest in her but seemed unwilling to get in touch with her directly, petitioner offered to write to her himself (R. 263). Again, nothing was done that night. At Thiel's request they agreed to meet again the next night, not at petitioner's apartment, because Thiel had too many acquaintances there and did not want them to see him, but at the Twin Oaks Inn (R. 269).

The meeting thus begun the next evening at the Twin Oaks Inn, and continued at Thompson's Cafeteria, constitutes the first and second overt acts charged. After they met at the Twin Oaks Inn, Thiel told petitioner that they were to be joined by Kerling, and that Kerling had come over with him from Germany (R. 271). Kerling was in fact the leader of Thiel's group of saboteurs (R. 40). Kerling did not stay long (R. 272–273). After he left, Thiel and the petitioner talked for some time, and then Thiel brought up the subject of the money. He went to the washroom to take off his money belt. After they left the restaurant petitioner took the money belt and

money, and put them in his pocket. Thiel told him to take out the $200 which Thiel owed him, and also told him not to put all the rest in the safe deposit box, but to keep some in his room, so that he would not have to go to the bank all the time in the event Thiel had to call on him suddenly for some funds (R. 273–274, Def. Ex. C). Petitioner kept the money throughout the continuation of their conversation at Thompson's Cafeteria, and on returning to his apartment he put the money in a drawer and the money belt in his shoebox. The next evening he wrote Norma Kópp, as arranged with Thiel, asking her to come to New York for "great news," "a pleasant surprise," and "news of the most sensational nature," but cautiously avoided saying anything from which Thiel's arrival could be suspected (R. 277). Thiel himself had suggested that no mention of his name be made in the letter (R. 264). The following day petitioner put the bulk of Thiel's money in his safe deposit box (R. 279–281).

In the light of the setting in which the meetings charged as overt acts 1 and 2 thus occurred, we submit that the meetings, marked as they were by friendly and earnest discussion by the petitioner and two known enemies of the United States (R. 80), in themselves constituted aid and comfort to these enemies. Little imagination is required to perceive the advantage which such

meetings would afford to enemy spies not yet detected. Even apart from the psychological comfort which the meetings furnished Thiel and Kerling by way of social intercourse with one who they were confident would not report them to the authorities as a loyal citizen should,[32] the meetings gave them a source of information and an avenue for contacts with others. The meetings enabled them to be seen in public with a citizen apparently above suspicion, and thereby to appear to be mingling normally with the citizens of the country with which they were at war.

In aid of his argument that overt acts 1 and 2 are insufficient in law as overt acts of treason, petitioner points out that no case has been cited in which "a mere meeting with an enemy has been held to be a sufficient overt act of treason" (Pet. Br., p. 35). Doubtless the facts of this case have not been precisely duplicated, but that does not give the answer. We are not concerned with a "mere meeting", but with a meeting shown to have been an integral and essential part of the giving of aid and comfort to the enemy. The act of meeting here can no more be separated from its background and purpose than could the

[32] That their confidence was justified is shown not only by petitioner's failure to report his knowledge or suspicions to the authorities, but by his own admission of unwillingness to "betray a friend" even if he knew that the friend had come here as a German agent to spread enemy propaganda (R. 397–398).

act of boarding a small boat in *Lord Preston's Case, supra,* pp. 41–48,[33] the act of borrowing money from a bank in *United States* v. *Fricke, supra,* pp. 50–51, or the act of escorting a companion to an automobile in *Stephan* v. *United States, supra,* p. 53. Each is innocuous when viewed in isolation; each takes on its treasonable significance from the fact that it was an integral part of a design to give aid and comfort to the enemy, and was carried out in furtherance of that design.

Thus, the significance of the meetings is by no means confined to the relatively intangible forms of aid and comfort to the enemy mentioned above. The meetings were part and parcel of a far more specific program. Petitioner, though he might not have known the precise details of Thiel's mission, was fully aware of its seriousness, to such an extent that he warned Thiel that "anything that he might undertake would be ineffectual or useless" (R. 142). Thiel, on the other hand, needed a means to reach Norma Kopp without disclosing

[33] The petitioner seeks to distinguish *Lord Preston's Case* as showing merely that preparatory acts which might not themselves be legally sufficient may be admissible if they are connected with a design which is also proved by other legally sufficient overt acts. However, to sustain the venue in *Lord Preston's Case*, it was necessary to establish a legally sufficient overt act in the County of Middlesex. Furthermore, petitioner's suggestion is inconsistent with the principle upon which he himself quite properly relies—namely, that in a trial for treason each of the overt acts submitted to the jury must be sufficient as a matter of law (Pet. Br., p. 18).

his presence. He needed a place to hide the money he had brought from Germany. He felt petitioner out on these matters at their first meeting, on June 22nd. He arranged a meeting between petitioner and his own leader, Kerling, which could have had but one purpose, approval of his course in accepting petitioner's assistance. Following the meeting with Kerling, Thiel entrusted his money to petitioner. From that moment on, petitioner, and not he, carried the large sum of money in gold notes. If they had been arrested as they walked to Thompson's Cafeteria, or as they continued their conversation there, possession of the money would have cast suspicion on petitioner, not on him. And if still later the money were to be found in petitioner's safe deposit box it would be petitioner, not he, who would have to explain its presence.

Given, then, the petitioner's treasonable intent, as found by the jury, the meetings with Thiel and Kerling, and with Thiel alone, were integral, vital, and indispensable parts of petitioner's treasonable program of aid and comfort to the enemy. They gave aid and comfort in themselves. The case is much stronger than in *Lord Preston's Case*, where not only did the treasonable design as a whole fail before any actual aid and comfort could be brought to the enemy, but the overt act itself, the innocuous act of entering a small boat.

could in itself have afforded no aid and comfort even had the design as a whole succeeded. Here, not only did the overt act of meeting give aid and comfort in itself; it was an essential step towards efforts by petitioner to give further aid and comfort. He wrote Norma Kopp on Thiel's behalf, in such a way as to bring her to New York without arousing suspicion. He refrained from communicating to the authorities what even he admitted were "hunches" as to Thiel's hostile mission (R. 148–149), and when questioned by agents of the Federal Bureau of Investigation he deliberately lied as to the knowledge he had secured from the meetings, and as to Thiel's ownership of the money. He did all that according to his own testimony Thiel asked of him, and all that in the nature of the situation and the short time available lay in his power.

Nor is it material to the issue of law involved that the petitioner was not shown to have attempted aid and comfort to the enemy on any grand scale—to have furnished secret military information, to have assisted in blowing up aluminum plants, or to have secretly organized a fifth column. Though treason is the most serious of all crimes, degrees of gravity in the offense are clearly recognized in the power conferred by the Constitution on Congress to "declare the Punishment of Treason" (Constitution, Art. III, sec. 3),

and in the discretion which Congress under this power has conferred on the courts to fix penalties ranging from death down to imprisonment for only five years and fine of only $10,000.[34] When treasonable intent exists and an overt act is done in its furtherance, the crime of treason is committed. The magnitude of the aid and comfort furnished or attempted in the particular case does not determine the guilt, but only the punishment.

The 10th overt act is, we submit, also clearly sufficient as an overt act of treason. This act consisted in the giving of false information concerning Thiel to agents of the Federal Bureau of Investigation who were investigating his activities.[35] The obvious and necessary effect of petitioner's false statements—if believed, as he had no reason to suppose they would not be—was to conceal from the authorities the fact that Thiel, a Nazi agent, had just arrived from Germany by submarine on a mission for the German government, and that petitioner had secreted in his own safe deposit box $3,500 in American money which Thiel had brought from Germany to aid in his mission. It is difficult to conceive of an act tending more directly to aid an enemy. Petitioner himself admitted on the stand that his intent in making the false statements was to aid Thiel

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[34] Criminal Code, § 2, 18 U. S. C. 2, quoted *supra*, pp. 3–4.

[35] The false statements charged are summarized in the Statement, *supra*, pp. 19–20; see also footnote 46, *infra*.

(R. 292).[36] He did not know that Thiel was in custody at the time they were made, and his own admissions show clearly that he believed that Thiel could still be aided.

It is true that later in the course of the same interview with Agents Willis and Ostholthoff petitioner recanted his previous false statements. Petitioner does not now urge that this recantation deprived his previous false statements of such significance as they may have had as legally sufficient overt acts.[37] Nor does he apparently

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[36] He contended that he was trying "to protect Werner Thiel's identity" because he "knew he had had trouble with the Draft Board" and had been using the assumed name of William Thomas (R. 292). But petitioner, from his own testimony on the stand (R. 263–268, 270–272), knew that Thiel had just returned from Germany, and could hardly have supposed that it was only a draft board from which Thiel stood in need of protection. Furthermore, as shown by the testimony of Agents Willis and Ostholthoff (R. 107, 153), even after petitioner learned that the agents knew of the identity between Thiel and William Thomas, he repeated his false statements that Thiel had been working on the Pacific Coast and had not been out of the United States. Such repetition could not have been for the purpose of protecting Thiel merely from difficulties with his draft board.

[37] If a treasonable design to aid the enemy is once consummated by an overt act, the crime of treason is, of course, complete, and cannot be obliterated by future actions. When the overt act consummating the crime consists of false statements giving aid and comfort to the enemy, recantation should, we submit, have no greater palliative effect than recantation of false statements shown in support of a charge of perjury. See *United States* v. *Norris*, 300 U. S. 564, 574.

press upon the Court the position taken by Judge Clancy in *United States* v. *Leiner*, that false statements made to arresting officers cannot constitute an overt act of treason unless it is proved "that the prisoner knew or had reason to believe that the enemy alleged to be adhered to had not yet been apprehended and that the misstatements are such that their obvious result would be to avert the enemy's apprehension or aid his depredations, and further, such as could not exculpate the prisoner" (Pet. Br., Appendix I, p. 48).[38]

Somewhat inconclusively, however, the petitioner does suggest that overt act 10 may possibly

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[38] The unreported remarks of Judge Clancy (S. D. N. Y.) in directing a verdict for the defendant in that case are set forth in Appendix I of petitioner's brief.

We submit that Judge Clancy's position is extreme, and does not represent the law. Under his view, one who, with every reason to believe that the enemy he wished to aid had been apprehended, nevertheless made false statements in the faint hope that the enemy was still at large and in that event might be aided in his escape, would not be guilty of treason even if the faint hope proved well founded and the false statements achieved their purpose. Furthermore, the assumption that an enemy in custody cannot be aided treasonously is obviously unfounded. The present case is an illustration. If petitioner's false statements had been believed, as he clearly intended them to be, Thiel might have been released or held only on a charge of draft evasion, and a large sum of money might have been kept available for the further prosecution of Thiel's hostile mission.

Judge Clancy's requirement that the false statements be "such as could not exculpate the prisoner" is, we submit, likewise unsound. Presumably it is a mere corollary of the view, the correctness of which we have endeavored to disprove

be regarded as legally deficient on the ground that it consisted of oral statements made by him shortly after his arrest. Petitioner refers to general observations in the English authorities "that mere words may not ordinarily constitute an overt act in treason," and also to the practical likelihood "that in the fear and excitement attendant upon the arrest many people make false statements with a vague idea that in some way they may extricate themselves" (Pet. Br., p. 36).

We submit that these considerations, in the setting of this particular case, have no tendency to weaken the legal sufficiency of overt act 10. It is true that the act charged is an act consisting of words. But the reluctance of the law to attribute treasonable significance to "mere words" does not extend where, as here, the words themselves constitute operative acts capable of effectuating a treasonable intention. Statements

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(*supra*, pp. 29–53), that an overt act of treason, to be legally sufficient, must show on its face its treasonable character and must leave no possible room for any conceivable inference of innocence. In any event, the requirement is inconsistent with the cases holding that acts may be treasonable even if committed with more than one motive, such as the motive of self-interest or pecuniary gain (*Haupt v. Doane*, 79 U. S. 342, 347; *Sprott v. United States*, 87 U. S. 459, 463; *Charge to Grand Jury—Treason*, 30 Fed. Cas. 1036, Case No. 18,272, at p. 1037 (C. C. S. D. Ohio, 1861)). Application of such a requirement would be peculiarly inappropriate in a case such as this, where the petitioner testified that his false statements were intended to help Thiel, and that he was not trying to shield himself (R. 292).

of opinion, or even statements of intention, may not be treason under our law; but that does not mean that an act of aid and comfort to the enemy is immune to legal consequence merely because it takes verbal form. A most obvious act of treason would be the communication of secret military intelligence to the enemy—which could be done most effectively by the use of words; but so far as we know no authority has ever suggested that such an act would be any the less an overt act of treason because effected verbally.[39] Here, in overt act 10, we have not the use of words to convey intelligence to the enemy, but—if the jury believed that the proof supported the allegations in the indictment—the use of words to divert suspicion from the enemy. Words in such a context can substantially aid and comfort the enemy, and it was for the jury to decide whether the petitioner's words were in fact a constituent part of his attempt to render such aid and comfort.

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[39] Communication of intelligence to the enemy, whether oral or written (*Charge to Grand Jury—Treason*, 30 Fed. Cas. 1036, Case No. 18,272, at p. 1037 (C. C. S. D. Ohio 1861)), sending a letter to the enemy offering to join his forces (*Medway v. United States*, 6 Ct. Cl. 424, 433 (1870)), and advising, inciting, or persuading others to give aid and comfort to the enemy (*Charge to Grand Jury—Treason*, 30 Fed. Cas. 1034, Case No. 18,270, at p. 1035 (C. C. S. D. N. Y. 1861); *Rex v. Casement*, [1917] 1 K. B. 98, 99), have always been considered to be acts of treason, even though in a literal sense the acts consisted of words. See, generally, Warren, *What is Giving Aid and Comfort to the Enemy*, (1918) 27 Yale L. J. 331, 334–344.

Nor should the case be affected at this stage by the fact that the false statements constituting overt act 10 were made shortly following petitioner's arrest. When the words or other conduct of one under arrest take the form of an overt act which would be treasonable if done with treasonable intent, the mere possibility, or even probability, that they might have been affected by the arrest cannot justify withdrawing them from the consideration of the jury. It was the function of the jury to determine the intent underlying the petitioner's words, and to make that determination in the light of all the circumstances, including the circumstance of recent arrest.

II

Each of the Overt Acts Submitted to the Jury Was Proved by the Testimony of Two Witnesses Within the Meaning of the Constitutional Requirement.

Overt act 1—petitioner's meeting with Kerling and Thiel at the Twin Oaks Inn on June 23rd—was plainly proved by the testimony of four Special Agents, each of whom testified that he saw the petitioner in conversation with Kerling and Thiel at the Inn.[10] As we understand it, the petitioner does not claim that this overt act was

[10] Special Agents MacInnes and Willis were following Kerling. They both saw him enter the Inn at about 8:20 p. m. MacInnes followed him into the Inn, while Willis remained outside, but at a place where he could see the three

not sufficiently proved by the testimony of two witnesses. However, the petitioner challenges the sufficiency of the proof of overt acts 2 and 10, on the ground, as to overt act 2, that different portions of the act were proved by different sets of witnesses, and as to overt act 10, that one portion of the act was proved by one witness only. In addition, the proof of overt act 10 is challenged on the ground that the testimony of the Special Agents was inadmissible under the doctrine of *McNabb* v. *United States*, 318 U. S. 332. We submit that none of these grounds of objection is well taken.[41]

A. AS TO OVERT ACT 2

Both the court below (R. 486–487) and the petitioner in his brief in this Court (Pet. Br., p. 43) approach the proof of overt act 2 on the assump-

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in conversation. Between 9 and 9:30 Agents Fisher and Rice also entered the Twin Oaks Inn, and each of these agents likewise testified to having seen the petitioner sitting and talking with Kerling and Thiel. (R. 67–68, 73–74, 79–80, 101–102.) MacInnes left the Twin Oaks Inn at about 9:25 to report to his superiors, but returned in time to see Kerling leave the Inn at about 9:45 (R. 67–68), and MacInnes, Rice, and Fisher each followed Kerling out of the restaurant when he left (R. 68, 74, 80). Willis remained and watched Thiel and Cramer until they left at about 11:00 p. m. (R. 102).

[41] Since there is no contention that overt act 1 lacked the necessary proof by two witnesses, the case might seem to be governed by the accepted rule in conspiracy cases that any number of legally sufficient overt acts may be submitted to the jury, even though the proof is sufficient only as to one. As pointed out by the court below (R. 481) in such a situation

tion that it consisted of two phases,[42] which were separately observed by different sets of witnesses. On this assumption, the petitioner contends that the trial judge committed error in failing to charge the jury that the same two witnesses must testify to the whole of the overt act. On the same assumption, the court below rejected the petitioner's contention, holding that there is "no reason in policy or law to require the same two witnesses to the whole overt act" (R. 486).

We agree with the view of the court below. The overt act charged was a conference between the petitioner and Thiel at two places, and even on the court's assumption that the two separate phases of the conference were observed by different sets of witnesses, the conference as a whole was proved by the testimony of two witnesses and more.[43]

"it can be presumed upon a conviction that the jury has properly fulfilled its time-honored function of weighing the evidence and that its finding of guilt was based on the one sufficiently proved overt act." However, the petitioner contends that the trial judge committed legal error in his charge to the jury with respect to the proof necessary to establish an overt act consisting of several parts. While we do not concede any such error in the charge, we do concede that if any such error had occurred it would have rendered inapplicable the rule in question.

[42] Overt act 2 charged the petitioner with a meeting with Thiel first at the Twin Oaks Inn and later at Thompson's Cafeteria.

[43] Where at least two witnesses testify to having seen the defendant engaged in the overt act charged, it is unnecessary that they should have seen him at the same time and place.

But we submit that the petitioner poses, and the court below answered, a question not in fact presented by the record in this case. If it be assumed that the conference between the petitioner and Thiel charged in overt act 2 comprised separate phases each of which must be established by testimony of the same two witnesses, the record shows that this requirement was met. Agents Willis, Fisher, and Rice testified to that phase of the conference which occurred at the Twin Oaks Inn (R. 74, 80–81, 101–102). These three, together with Agent Foster, testified to having followed the petitioner and Thiel from the Twin Oaks to Thompson's Cafeteria (R. 74–75, 81, 86, 102). The same three, together with Agent Stanley, testified to having seen the whole of the phase of the conference which occurred at Thompson's Cafeteria (R. 75, 81, 84, 102). All phases of the conference charged in overt act 2 were thus

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United States v. *Mitchill*, 2 Dall. 348, 355–356, discussed with approval by Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. 55, Case No. 14,693 (C. C. D. Va. 1807), at p. 173; see also *United States* v. *Fricke*, 259 Fed. 673, 677 (S. D. N. Y. 1919); *Regina* v. *McCafferty*, 10 Cox Cr. Cas. 603, 608 (1867).

There is nothing contrary in the holding of Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685 (S. D. N. Y. 1919). As pointed out by the court below (R. 486), Judge Hand was dealing with efforts to meet the two witness rule by two witnesses each of whom singly proved a separate part of the act.

proved by the testimony of the same three witnesses.

In this state of the record, the only possible criticism which could be directed at the proof of overt act 2 would be that the first *part* of the first phase of the conference was observed, and testified to, by but a single witness, Agent Willis.[14] However, we submit that such an argument would be without substance.[15] Overt act 2, as charged in the indictment, did not specify any length of time for the conference nor any specific time of its beginning or end. The indictment charged merely that the petitioner conferred with Thiel "on or about June 23, 1942 * * * for a period of time at the Twin Oaks Inn * * * and at Thompson's Cafeteria" (R. 4). The charge was fully proved by testimony from at least two witnesses that the petitioner and Thiel conferred at these two places for some period of time on the

[14] Agents Fisher, Rice, and MacInnes left the restaurant at about 9:45 p. m., when Kerling left, and followed him until he was arrested (R. 68, 74, 80). Agent Willis alone remained and watched the entire further conference between Thiel and Cramer at the Twin Oaks Inn (R. 102). However, Agents Fisher and Rice returned before the petitioner and Thiel left the Twin Oaks Inn, and all three followed the petitioner and Thiel to Thompson's Cafeteria and watched their further conference there (R. 74–75, 80–81, 102).

[15] It is not entirely clear whether petitioner presses this argument, but we answer it on the assumption that it is implicit in his contention "that there must be two witnesses to the *whole* overt act" (Pet. Br., p. 43).

evening of June 23, 1942. That they may also have conferred at the same places at other times not proved by the testimony of two witnesses is clearly irrelevant.

B. AS TO OVERT ACT 10

Overt act 10 charged the petitioner with five specific misstatements of fact made, immediately after his arrest, to Agents Willis and Ostholthoff, of the Federal Bureau of Investigation. Four of the misstatements, and a part of the fifth, were fully proved by the testimony of these two agents. The fifth misstatement charged was: "That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank" (R. 6–7). Agent Willis testified to the making of all of this statement (R. 107–108); Agent Ostholthoff testified to the making of all of it except the final explanatory clause, that the petitioner kept the money in a safe deposit box "because he considered it safer there than in his savings account" (R. 154).

We submit that the court below was correct in holding (R. 487) that overt act 10 was sufficiently proved by this testimony. Two witnesses testified

unequivocally to the act in all important respects. In full detail they proved the first four falsehoods charged. As to the fifth, they both proved that the petitioner admitted the presence of the money in his safe deposit box and falsely stated that the money belonged to him and that it had been obtained by him from the sale of securities. In view of these proved allegations, the additional false statement (proved by only one of the witnesses) as to the *reason* for keeping the money in the safe deposit box cannot conceivably, we submit, be regarded as material. It is a mere surplus detail, which could not affect the substance of the overt act alleged and proved.

But there is a further answer. Agent Willis testified to every statement, material or immaterial. Even if the testimony of Agent Ostholthoff be entirely disregarded, the requirement of a second witness is, we submit, supplied by the testimony of the petitioner himself. The petitioner, taking the stand in his own defense, on direct examination testified clearly and completely to the making of all the false statements charged to him, and to their falsity. The proof supplied by his testimony was not inferential; it was compelling and inescapable.*

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* The petitioner's testimony in this respect was as follows (R. 292):

"Q. You say it was Mr. Willis, Mr. Ostholthoff, and perhaps some others who were questioning you?—A. Well,

We know of no ground in reason or authority for rejecting the unequivocal testimony of the defendant himself in a treason trial as to the objective facts of an overt act charged against him, or for declining to accept his testimony as the testimony of one of the necessary two witnesses.[47]

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there were four men if I recall correctly altogether, and everyone did a little questioning.

"Q. Now, is it a fact that when they first questioned you you lied to them?—A. I did; yes, sir.

"Q. And you are charged here with having told certain specific untruths.—A. I did; yes, sir.

"Q. And I want to ask you whether you told them these things. That you told them first that Thiel's name was Bill Thomas. Did you tell them that?—A. That is correct; yes, sir.

"Q. And that you told them also from March 1941 until June 1942 Thiel had been working in a factory out on the West Coast?—A. Yes; I don't deny that.

"Q. And that you told these men that Thiel had not been out of the United States for that period?—A. Yes, sir.

"Q. And that you told them that the money belt that Thiel had given you contained only a couple of hundred dollars that Thiel had owed you?—A. Yes, sir.

"Q. And, finally, that the $3,500 in the safe deposit box belonged to you and no one else and had been obtained by you from the sale of your securities, and was kept there because you considered it safer than a savings bank?—A. That is right."

[47] The legal sufficiency of the petitioner's own testimony to supply one of the necessary two witnesses, though not considered by the court below, was touched on briefly at the trial. On motion for a directed verdict at the conclusion of all the testimony, counsel for the petitioner stated, without citation of authority, that "statements by the defendant cannot under the constitutional definition and the statute supply

Treason, of course, is the most serious of all crimes. Because of its very seriousness trials for treason are likely to be affected by prejudice and to be subject to the dangers of perjury. The two witness requirement was designed to mitigate these dangers.[48] We see no reasonable basis for holding that acceptance of the testimony of the defendant himself as the testimony of one of the necessary witnesses in any way impairs the protection which the Constitution is designed to afford him.

We do not suggest that a defendant in such a case should be held to have given the "confession in open court" referred to in the last clause of the constitutional provision.[49] Clearly a defendant who admits the objective facts of an overt act charged against him, but seeks to explain them as innocent, and denies a treason-

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the proof. No statement by any defendant may do that. That is the rule in treason cases." Counsel for the United States denied the existence of authority for such a rule, but in order to avoid all possible question elected to go to the jury on only those three overt acts which had clearly been proved by the testimony of two witnesses in addition to the petitioner (R. 369-370).

[48] The Federal Convention consciously rejected the rule, developed in England, that treason could be established by the testimony of one witness to one overt act and another to another. See discussion of the debate in the Convention, *supra*, pp. 37-38.

[49] See *United States* v. *Magtibay*, 2 Philippine Reports 703 (1903). There the defendant in a treason case, testifying as a witness in his own behalf, admitted the facts of the overt

able intent, has made no "confession" of the whole crime of treason. Nor do we suggest that proof of a confession made out of court may serve as proof of the required overt act. But apart from confessions, the Constitution and the treason statute permit conviction upon proof of an overt act by two witnesses who may be, and without doubt frequently are, hostile to the defendant and subject to the temptations of perjury either in their own interests or those of the government. We submit that when a defendant, testifying voluntarily in his own behalf, makes on the stand statements which unequivocally establish his overt act, those statements are entitled to at least as much credence as the same statements from the mouth of a hostile witness, and should as a matter of law be accepted as the testimony of a necessary witness within the meaning of the constitutional and statutory requirements.[50]

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act charged, namely, that he had joined the forces of the enemy, but claimed that he had done so against his will, after capture, and with the intent of escaping as soon as possible. There was no other witness to this overt act. The court held, properly, that his admission was not a "confession" within the meaning of the treason statute there applicable, which imposed the same requirements of proof as are here involved.

[50] The petitioner did not, of course, admit the treasonable intent. But, as we have shown (*supra*, pp. 29–35), the intent of an overt act is a matter of inference to be drawn by the jury from all the evidence in the case, and need not be proved by the two witnesses who testify to the happening of the act. There is no greater reason for requiring that a defendant who

Overt act 10 is therefore sufficiently proved by the testimony of Agents Willis and Ostholthoff, and if any deficiency is held to exist in the testimony of Agent Ostholthoff, that deficiency is supplied by the testimony of the petitioner himself.

Petitioner, however, now urges, for the first time, that the testimony of both Agents Willis and Ostholthoff is inadmissible under, or by analogy to, the decision of this Court in *McNabb* v. *United States*, 318 U. S. 332. We submit that the doctrine of the *McNabb* case has no application.

This point, although not previously argued, was noticed by the court below with respect to its possible application to a written statement made by the petitioner and introduced in evidence at the trial, and was disposed of adversely to the petitioner (R. 480, note 2). It is now raised, not in the context in which it was discussed by the court below, but with reference to the admissibility of the testimony of Agents Willis and Ostholthoff to prove the making of the false statements charged as overt act 10. The contention now made is that, since the false statements were made after the petitioner accompanied the Special Agents to the headquarters of the Federal Bureau of Investigation, but prior to arraignment, the

serves as a witness to his own overt act should prove his intent than for imposing the same requirement with respect to the testimony of any other witness.

testimony of the agents to whom the false statements were made is subject to the same vice as inhered in the evidence of confessions excluded in the *McNabb* case.[51]

We submit that the doctrine of the *McNabb* case is totally inapplicable to the situation here presented. This is not a case of a confession of crime under circumstances which, as in the *McNabb* case, imply the danger of compulsion.[52] There

[51] Petitioner's false statements were made on June 27, 1942. The record recites that the petitioner was arraigned under the treason indictment on August 31, 1942 (R. 1), but is silent as to whether there was any prior arraignment on any charge. However, since on the testimony it is clear that the petitioner's false statements were made immediately upon his arrival at the Federal Building on the evening of June 27th, it appears probable that they were made prior to any arraignment.

[52] It may be doubted whether petitioner was under arrest at all; he had merely been requested to accompany the Special Agents to headquarters because they wanted to talk with him (R. 105). But in any event, the false statements were, by petitioner's own testimony, made deliberately and voluntarily, for the purpose of shielding his friend Thiel (R. 292). They were made immediately upon his arrival at the Federal Building in company of the Special Agents, at 11:20 on a Saturday night (R. 106), and before it would have been practicable for the agents to secure his arraignment on any charge. Cf. *United States* v. *Mitchell*, Nos. 514, 515, this Term, certiorari granted January 17, 1944, in which it is contended on behalf of the United States that the doctrine of the *McNabb* case is inapplicable to voluntary confessions made to arresting officers immediately upon arrest and prior to any practicable opportunity for arraignment. This contention, if upheld in the *Mitchell* case, would be sufficient in itself to dispose of petitioner's

is no contention or suggestion that petitioner acted otherwise than voluntarily. Petitioner's statements did not constitute an admission of incriminating facts made under putative duress; they constituted the operative facts of a crime charged to him. That he would have had no occasion to make the false statements if he had not been interrogated by the Special Agents, or that he might not have made them had he been arraigned before being interrogated, is beside the point. If the petitioner was under arrest, that fact bore on his actions only in the sense that it served as the stimulus to his own voluntary act of attempting to exculpate Thiel.

Indeed, the logical result of the petitioner's present claim would seem to be that no act committed by a person while under illegal restraint [53] could constitute a crime, or at least that a crime committed by a person while under illegal restraint could not be proved by the testimony of those who observed its commission. The proposition carries its refutation on its face. We do not believe that the *McNabb* case was intended to have any such force, nor that its doctrine is available here to exclude the testimony of Agents

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argument here; its rejection, on the other hand, would leave undisturbed the entirely separate distinction noted in the text.

[53] As noted above, footnote 52, we do not concede that the petitioner's false statements were made during illegal restraint.

Willis and Ostholthoff to the making of the false statements charged against the petitioner.

Accordingly, we respectfully submit that the requirement of the two witness rule was fully satisfied as to each of the three overt acts submitted to the jury.

III

The Petitioner's Assignments of Error in the Conduct of the Trial are Without Merit

The petitioner contends that the district court committed reversible error:

(a) In admitting in evidence a newspaper copy of the Constitution of the United States on which the petitioner had marked the section defining treason;

(b) In permitting the United States Attorney to ask him, on cross-examination, whether he had received a letter from his nephew, Norbert, warning him that his letters were so unfriendly to the United States that he was in danger of being put on a blacklist;

(c) In permitting the introduction of "an excessive amount of evidence" regarding the character and mission of the German saboteurs to whom he was charged with having given aid and comfort.

Each of these contentions was considered by the court below and decided adversely to the petitioner. We submit that the questions were correctly disposed of below. (R. 487–488.)

A. THE COPY OF THE CONSTITUTION

As pointed out by the petitioner (Pet. Br., p. 4) there was no dispute as to his actually having committed the specific actions charged in the several overt acts submitted to the jury. The petitioner himself admitted them on the stand, in all the detail charged. The crucial issue in the case was the intent with which the overt acts were committed. The petitioner took the stand in his own defense, and thereby subjected himself to cross-exa ination on matters directly relevant either to his credibility or to the intent with which he had committed the acts charged.[4]

On direct examination petitioner had testified that in his relations with Thiel in June of 1942 the thought had never occurred to him that he "might be aiding and abetting an enemy of the United States" and that he had at no time "any purpose or intent to hurt the United States or to help its enemies," or "to adhere to the enemies of the United States and to give them aid or comfort" (R. 297). Petitioner's defense, as a whole, was that though he might have acted stupidly or unthinkingly he had no treasonable intent. Against this background, the prosecutor asked him whether at any time he had been

[4] It is elementary that a defendant who takes the stand in his own defense subjects himself to cross-examination and impeachment to the same extent as any other witness (*Raffel* v. *United States*, 271 U. S. 494, 496; *Reagan* v. *United States*, 157 U. S. 301, 305).

"particularly interested in the law of treason" (R. 304). After a colloquy between court and counsel out of the presence of the jury, following which his counsel's objection to the question was overruled, he answered in the negative (R. 308). Thereupon the Government introduced in evidence, again over objection, a newspaper copy of the Constitution of the United States, found in the petitioner's possession and, by his own testimony, carrying marks made by his own hand against several provisions, including the provision defining the crime of treason (R. 308).

We submit that in this setting the relevance and materiality of the exhibit are obvious, particularly in the light of the petitioner's own testimony regarding it. He could not recall the exact reason why he had marked the treason paragraph, but explained that it was his habit "whenever I read, when something strikes my imagination or my curiosity, that I mark a paragraph" (R. 314). He could not on cross-examination recall exactly when he had made the mark, but his testimony placed it a little before his friend Thiel had left for Germany, in early 1941 (R. 313). The exhibit was material and relevant both to his intent, which in its nature could be proved only by circumstantial evidence, and to his credibility, in view of his denial that he had ever had any particular interest in the law of treason. The probative value may have been slight, but that was a ques-

tion for the jury, within the sound discretion of the trial court. The trial court's discretion in such matters is very wide, and should not be disturbed by appellate courts in the absence of clear abuse, of which there was none here.[55]

[55] "It is familiar law that where a case rests upon that character of evidence [i. e., circumstantial evidence] much discretion is left to the trial court, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." *Cline* v. *United States*, 159 U. S. 590, 592–593; see also *Beard* v. *United States*, 82 F. (2d) 837, 843 (App. D. C. 1936), certiorari denied, 298 U. S. 655; *Clark* v. *United States*, 293 Fed. 301, 305 (C. C. A. 5, 1923); *Merrill* v. *United States*, 40 F. (2d) 315, 316 (C. C. A. 5, 1930).

The petitioner cites only two cases in support of his contention that even though the exhibit might have had some probative value, it was improperly admitted in evidence. Neither case confirms his view. In *People* v. *Harris*, 209 N. Y. 70, 102 N. E. 546 (1913), the court reversed a conviction of murder in part because of the admission of evidence as to the defendant's previous relations with a prostitute. The court referred to the general rule that when a husband is charged with the murder of his wife his relations with other women may be shown as possible evidence of motive, but properly held the rule inapplicable to a showing of temporary relations occurring during a period of separation between the husband and the wife, and discontinued four years before the alleged murder. *People* v. *Razicicz*, 206 N. Y. 249, 99 N. E. 557 (1912), also cited by the petitioner, is closer to the case at bar, but carries no support for petitioner's position. On an indictment for murder by use of a bomb, the state introduced evidence that another bomb explosion had occurred not long before in a nearby place in the open country, and that at around the same time the defendant had acquired materials which might have been useful in constructing a bomb. The testimony as to the earlier bombing was held by the court of appeals to be admissible, as bearing upon the defendant's responsibility for the crime charged. The

B. THE WARNING IN NORBERT'S LETTER

On cross-examination, following a series of questions regarding the petitioner's attitude towards the United States as expressed in letters which he had written to Thiel and others in Germany during the year 1941, the petitioner was asked whether it was not a fact that his brother, through his nephew Norbert, had warned him that his letters discussed the United States in such an unfriendly fashion that Norbert's father thought that he (the petitioner) would be put on the blacklist because, according to Norbert's father, the letters went through an American censorship (R. 329). Over objection the court admitted both the question and the petitioner's answer, which was that he had received such a letter from his nephew Norbert (R. 330). The petitioner claims that the admission of the question and answer constituted reversible error.

We submit that no error was committed in this respect. On the issue of petitioner's intent questions as to his attitude towards the United States, as expressed in his letters, were proper cross-examination. The petitioner had denied (R. 329) that his letters, some of which were already in

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conviction was reversed not because of the admission of the evidence, but because upon a review of all the evidence the court concluded that direct evidence of the defendant's guilt, in the form of any overt act whatsoever on his part, was totally lacking, and that an inference of guilt could not properly be based merely on other inferences from circumstantial evidence.

evidence, were critical of or unfriendly to the United States. The question as to the warning in Norbert's letter was expressly asked for the purpose of refreshing his recollection (R. 329–330). On cross-examination the prosecutor is permitted to attempt to refresh the defendant's memory (*Hawkins* v. *United States*, 39 F. (2d) 294 (App. D. C. 1930); *Madden* v. *United States*, 20 F. (2d) 289, 293 (C. C. A. 9, 1927), certiorari denied, 275 U. S. 554; see *Wolk* v. *United States*, 94 F. (2d) 310, 313 (C. C. A. 8, 1938), certiorari denied, 303 U. S. 658; III Wigmore on *Evidence* (3d ed. 1940) sec. 730 (2)).

This is not a question like that presented in *Berger* v. *United States*, 295 U. S. 78, 84–88, involving improper questions based upon assumed facts never proved. The question was designed to probe the petitioner's recollection as to matters already properly in evidence, and dealt with a fact which the petitioner himself admitted—namely, that he had received a letter such as the prosecutor had described. Failure of the prosecutor to introduce the letter in evidence was not improper; a document cited to refresh a witness's recollection need not be produced when not called for by the witness (*Toplitz* v. *Hedden*, 146 U. S. 252, 254; *United States* v. *Dilliard*, 101 F. (2d) 829, 837 (C. C. A. 2, 1938); IV Wigmore on *Evidence* (3d ed., 1940) sec 1259).

The petitioner asserts (Pet. Br., p. 12) that the letter from Norbert "was not admissible on

any theory" and that the "alleged statements of petitioner's brother or the petitioner's nephew were obviously not binding upon the petitioner in any respect." This assertion, made without citation of authority, is itself open to some question. Though Norbert's letter was not in evidence, other letters from the petitioner to his family and to Thiel, of the type that evoked Norbert's letter, were already in evidence at the time the question was asked (see footnote 6, *supra*, p. 9). Just such a letter was involved in *People* v. *Colburn*, 105 Cal. 648, 651, 38 Pac. 1105 (1895), and although the letter was there held inadmissible in the absence of any showing that the defendant had received it or had known of its existence, the court commented that such a letter would be admissible "where the party receiving the letter has by his acts or conduct invited the sending of it to him." In *Cline* v. *United States*, 159 U. S. 590, telegrams addressed to the defendants were admitted as part of the Government's effort to establish by circumstantial evidence the existence of a conspiracy, and their admission was upheld by this Court on the principle that where a case rests upon circumstantial evidence "much discretion is left to the trial court, and its ruling will be sustained if the testimony which is admitted tends, even remotely to establish the ultimate fact" (159 U. S., at p. 593).

In any event, we submit that the court below correctly held (R. 488) that even if error had occurred in admitting the question and answer, the ruling was not substantially prejudicial. In view of the receipt in evidence of unfriendly letters concededly written by the petitioner (Exhibits 68, 69) the evidence as to Norbert's letter was merely cumulative and did not affect the substantial rights of the petitioner.[56]

C. THE EVIDENCE AS TO THE MISSION OF THE SABOTEURS

The petitioner complains (Pet. Br., pp. 14–18) that the trial court improperly permitted the introduction of an "excessive mass of evidence to establish that Thiel and Kerling were enemies of the United States."

We submit that the evidence admitted on this issue was not excessive. The whole of it, including colloquies of counsel, covered only 37 (R. 30–67) out of 340 (R. 27–367) pages of the testimony in the printed record. Establishment of the enemy character of Thiel and Kerling was essential to the Government's case. Petitioner sought to remove the issue from the case by admission of counsel that Thiel and Kerling were enemy spies (R. 17); but the Government was not precluded by this admission from establishing an essential fact of its case by direct testimony, and

[56] See Judicial Code, Section 269, 28 U. S. C. 391.

petitioner's counsel so conceded at the trial (R. 38), and so concedes here (Pet. Br., p. 17).[57]

Petitioner did not at the trial (cf. R. 48), and does not now, challenge the competency of the evidence on this issue. The most dramatic evidence—the testimony of Ernest Peter Burger, one of the saboteurs, as to the nature of the mission of the saboteurs (R. 30–43), and the exhibits introduced while he was on the stand—was introduced without objection.[58] Objection was thereafter made to the introduction of further evidence on the same

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[57] "It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove if the presiding justice in his discretion deems it proper to receive it. Parties as a general rule are entitled to prove the essential facts, to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight". (*Dunning* v. *Maine Central R. R. Co.*, 91 Me. 87, 97 (1897); see also *Davis* v. *Emmons*, 32 Ore. 389, 391–392, 51 Pac. 652 (1898)).

[58] In the trial of James Ings for treason the prosecution introduced in evidence "thirty-eight ball cartridges, firelock and bayonet, one powder flask, three pistols, and one sword, with six bayonet spikes, and cloth belt, one blunderbuss, pistol, fourteen bayonet spikes, and three pointed files, one bayonet, one bayonet spike, and one sword scabbard, one carbine and bayonet, two swords, one bullet, ten hand-grenades," and the witness was permitted to demonstrate to the jury their use. These exhibits were received without objection, although counsel for the defendant in summing up cautioned the jury not to give undue weight to "a display of visible objects" (*Trial of James Ings*, 33 How. St. Tr. 957, 1051, 1088 (1820)).

subject, on the ground that it was cumulative and prejudicial; but the Government was not obliged to rely exclusively on the testimony of Burger, himself a convicted saboteur. The exact character of the mission of Thiel and Kerling was a vital element in determining not only petitioner's guilt, but the gravity of his offense in giving them aid and comfort.[89] The petitioner complains only that at some indefinite point the continued receipt of evidence on this issue became improper. But whether at some point the evidence became unduly cumulative or repetitious was a question for the discretion of the trial court,[90] and we submit that no abuse of the trial court's discretion in the matter has been shown.

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[89] "His plea was not guilty, and he could not prevent the introduction of competent evidence to prove every element of the crime charged by admitting a part of them. The People were entitled to present to the jury all the facts, in order that they might have proper weight in determining criminal intention and what the verdict ought to be, as well as to decide whether the punishment should be by a fine, only, or by fine and imprisonment * * *" *People* v. *Munday*, 293 Ill. 191, 206, 127 N. E. 364 (1920), certiorari denied, 254 U. S. 638. See also *Abshier* v. *People*, 87 Colo. 507, 524–525, 289 Pac. 1081 (1930); *State* v. *Griffin*, 218 Ia. 1301, 1311–1312, 254 N. W. 841 (1934).

[90] Wigmore points out that "there should be no absolute rule on the subject; and the trial court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances" (IX Wigmore on *Evidence* (3d ed., 1940) sec. 2591).

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

CHESTER T. LANE,
ROBERT S. ERDAHL,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

WALTER J. CUMMINGS, JR.
Attorney.

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